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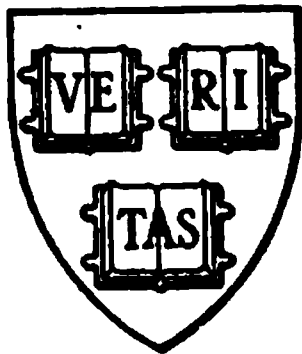
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9

R E P O R T S

OF

C A S E S

ARGUED AND DETERMINED

IN THE

HIGH COURT OF ADMIRALTY,

COMMENCING WITH

THE JUDGMENTS

OF THE

RIGHT HON. STEPHEN LUSHINGTON.

BY WILLIAM ROBINSON, D. C. L.

ADVOCATE.

*“Ea verè præstablis est scientia quæ in foederibus pactionibus conditionibus populorum regum  
externarumque nationum in omni denique belli jure et pacis versatur.” — CICERO.*

EDITED BY GEORGE MINOT,  
COUNSELLOR AT LAW.

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REPORTS OF CASES  
DETERMINED IN THE  
HIGH COURT OF ADMIRALTY.

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THE ROSE, Gilmore.

January 24, 1843.

The rule of the Trinity House, to port the helm, to be observed invariably in cases of steamships or other vessels meeting each other on adverse courses, when there is a probable chance of collision.

The expression, "giving way," means not crossing a vessel's bows, but going under her stern. A steam vessel putting her helm astarboard condemned in the damage, under the circumstances of the case.

*Seemle*, steam vessels not justified in going at the rate of ten knots per hour in a dark night ; if a steam vessel going at that rate comes into collision with another vessel, without either party seeing each other, the steamer will be responsible for the damage.

THIS was a cause of collision, promoted by the owners of the schooner *Regina* against this vessel, her tackle, &c., &c.

The schooner, as set forth in the act on petition, was bound on a voyage from Exmouth to Newport, in ballast, when, on the night of the 5th of October last, she was proceeding up channel, close hauled on the larboard tack, her course lying E. S. E., and the wind blowing from the N. E. or N. N. E. At the distance of about half a mile, she observed a steamer coming down channel, at the rate of ten or eleven knots an hour, with mainsail, foresail, jib, and topsail set; and, when the two vessels were within a quarter of a mile of each other, the master of the schooner ported her helm, hailing the steamer to do the same; but the helm of the steamer was kept astarboard, and, in consequence thereof, she ran stem on into the schooner.

\* The defence on the part of the steamer was, that the [ \* 2 ] night was dark and hazy, and the steamer had three bright lights burning, but the schooner hoisted no light; that no vessel could be seen at a greater distance than a quarter of a mile, and,

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The Rose. 2 W. Rob.

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when first discovered, the schooner was seen one point on the starboard side of the steamer; that, under the circumstances, it was the duty of 'The Rose to bear up, and, in order to do so, the master of the steamer did right in putting his helm astarboard.

The case was argued before Trinity Masters by

*Addams and Pratt*, for the owners of *The Regina*.

*Queen's Advocate and Elphinstone, contra*.

PER CURIAM.

Gentlemen — The material facts of the case are but little disputed, and the decision must turn upon the opinion which you may entertain, as to the propriety of the measures pursued by the masters of the two vessels, under the circumstances disclosed in the evidence before the court. It is not denied that the vessel proceeded against 'was coming down the Bristol Channel, at the time of the collision, at the rate of between ten and eleven knots an hour; and it is further admitted, by her own evidence in the cause, that there was a considerable haze upon the water, and that no vessel could be discerned at a greater distance than a quarter of a mile. Now if the steamer, coming down the channel at the rate as stated, had run down *The Regina*, without either of the parties seeing each other, I should have taken upon myself the responsibility of saying that

The *Rose* would have been responsible for the damage,  
 [ \* 3 ] \* and I will state the reason. It may be a matter of convenience that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity if the property and lives of other persons are thereby endangered. I well remember a case which occurred before Lord Ellenborough, in which this principle was applied, though not in a case of collision at sea. The driver of one of the mail coaches was indicted at the Old Bailey for manslaughter, he having run over and killed a man. It was urged in his defence that, by contract with the Post Office, he was compelled to go at the rate of nine miles an hour. Lord Ellenborough, adverting to that defence in his summing up, observed that no contract with any public office, and no consideration of public convenience, could justify the endangering of the lives of his Majesty's subjects. The man was convicted of manslaughter, and punished. The principle, so laid down by Lord Ellenborough, equally applies, I apprehend, to the present case; and, therefore, if the accident had happened in the manner I have stated, I should, without asking your opinion, have considered it my duty to have

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The Rose. 2 W. Rob.

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condemned the owners of this steam vessel in the amount of the damages sued for upon the present occasion.

But the two vessels in this case did, as it appears, perceive each other previous to the collision taking place. How then does the case stand, with respect to the measures that either party adopted in order to avoid the collision? The Regina was proceeding on the larboard tack, her course being E. S. E., and going at the rate of four knots an hour against the ebb tide. As soon as he perceived the \*steamer coming down upon him, that is, [ \* 4 ] when the two vessels were half a mile distant, the master of the schooner put his helm to port, and hailed the steamer to do so likewise. The steamer, according to her own account, does not perceive the schooner until a much later period of time, and then she starboarded her helm. It has been said, on behalf of The Rose, that when she first perceived The Regina that vessel was seen one point on the starboard side of the steamer; and it has been contended that this furnishes a justifying reason why the steamer should have put her helm astarboard; that, in so doing, she was acting in conformity with the Trinity House regulations, inasmuch as The Regina being close hauled, and The Rose being a steamer, and going free, by so bearing up she came within the words, — “giving way to a sailing vessel on a wind, or either tack.” It has also been contended that The Regina was in fault, in not carrying a light.

With respect to the latter point, I must observe that it has been discussed over and over again in former cases of this kind; and I believe there is no occasion in which it has been laid down, as a general principle, that merchant vessels ought constantly to carry lights.<sup>1</sup> Under certain circumstances, undoubtedly, it may be right and expedient to do so; and whether The Regina was bound to have carried a light or no, under the circumstances of this particular case, is a point which you will take into your consideration.

You will also have to determine whether, under the circumstances, the steamer was right in putting her helm to starboard; and whether, in so doing, she was giving way to a vessel on the larboard \*tack, within the meaning of the rule laid down in [ \* 5 ] the Trinity House regulations.

As regards the assertion that the schooner, when first observed, was seen one point on the starboard side of the steamer, it appears to me that, in construing the rule laid down by yourselves, we never

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<sup>1</sup> [The Iron Duke, 2 W. Rob. 382.]

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The Jenny. 2 W. Rob.

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can, with any hope of a satisfactory result, enter into the discussion as to the precise point in which one vessel lies to another at the time of being discovered. In my humble judgment the safe course is, to hold that the rule applies on all occasions where there is a probable risk of two vessels coming into collision. You will have the goodness, gentlemen, to consider the points to which I have directed your attention, and to tell me which of the two vessels was, in your opinion, to blame.

*Trinity Masters.* No blame attaches to The Regina. The expression, "giving way," means not crossing a vessel's bows, but going under her stern. Considering the short space of time that intervened, The Regina did right in porting her helm, and The Rose was entirely in fault.

Damage pronounced for with costs.

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### THE JENNY, Bowack.

#### *Motion.*

January 24, 1843.

Query ? How far a bottomry bond given in port, prior to the commencement of a voyage, is recoverable by proceedings in the Court of Admiralty.

In this case, the vessel being in the port of London and laden with a cargo of merchandise destined on a voyage to Jamaica and back to London, the master, being without funds or credit, applied to W. M., a merchant of London, for the loan of a sum of [ \* 6 ] money on bottomry. The money was \* advanced, and the master executed a bottomry bond in favor of W. M., for the sum of 990*l*.

The bond was made payable within sixty days after the arrival of the ship in the port of London, or at the end and expiration of six calendar months from the date of the bond.

The vessel proceeded to Jamaica, and returned to this country upon the 26th September, 1842.

A warrant of arrest was taken out against the ship, and the usual proceedings having been had, the court was now moved by *Burnaby* to direct a decree of appraisement, and a perishable monition to issue against the ship.

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The Mountaineer. 2 W. Rob.

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PER CURIAM.

I feel that some difficulty arises upon the face of this bond. The bond purports to have been given whilst the vessel was lying in port, prior to the commencement of a voyage.

*Burnaby.* The bond is drawn up in precisely the same terms as the bond in the case of *The Hero*.<sup>1</sup> Moreover, the parties interested in the ship have had notice of this application, and no objection is raised on their behalf.

PER CURIAM.

As the owners have had notice of the application, and no objection is taken on their behalf, I shall sign the *primum decretum*, and direct the decree to issue as prayed.

If any objection had been raised on behalf of the owners, I should have entertained much doubt in granting this motion.

The acquiescence of the owners relieves me from \*the [ \*7 ] doubt in the present instance. I shall, therefore, grant the motion; but I wish it to be understood that, in so doing, I give no opinion upon the question how far a bond given in port, prior to the commencement of a voyage, is recoverable by proceedings in this court.

Motion granted.

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### THE MOUNTAINEER, Heaton.

January 31, 1843.

When two vessels come up together, to render assistance to a ship in distress, all the persons composing the crews, although a part only are actually employed, are entitled to be considered as salvors.

In this case *The Mountaineer*, a barque of 354 tons, having struck upon the Tongue Sand, and afterwards upon the Shingles off Margate, upon the 8th of September last, two luggers, *The Mary* and *The Liberty*, of the joint burden of forty-nine tons, went to her assistance; and, upon the following morning, having brought out an anchor and cable, the salvors succeeded in conducting her to the North Foreland, when she was taken in tow and brought up to London by a steamer.

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<sup>1</sup> [2 Dod. 139.]

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The Hope. 2 W. Rob.

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The value of the ship, cargo, and freight was 12,000*l.*, and a tender of 120*l.* was offered and rejected.

The case was argued by

*Addams* and *Robinson*, for the salvors.

*Queen's Advocate* and *Elphinstone*, *contra*.

The COURT awarded the sum of 250*l.*, and in the course of the judgment observed: "There is much discrepancy with respect to the manner in which the services of the salvors were tendered and accepted. On the one hand, it is said by the master that he only accepted the assistance of five men, and on the other it is [ \* 8 ] alleged by the salvors \* that the services of all were accepted.

Now I am of opinion, that when two vessels come up together to render assistance to a ship in distress, all the persons composing the crews, although a part only are actually employed, are entitled to be considered as salvors. It is probable that, under the circumstances in which they were placed, the pilot, the master and crew were exceedingly alarmed; and I think the statement of the salvors upon this point is supported by all the facts of the case. I am of opinion that the tender is not sufficient.

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### THE HOPE, Hart.

January 31, 1843.

If a vessel chooses to avail herself of a particular mode of going down the river at a particular time, which renders it difficult to escape a collision, she must bear the consequences of the contingency to which she has exposed herself.

Plea, in a cause of damages, that the ship causing the collision was being warped down the river at the time, and in consequence could not get out of the way, overruled.

THIS was a case of collision under the circumstances noticed in the judgment of the court.

For the owners of the barge, *Addams*.

For the owners of The Hope, *Phillimore*, *A. A.*, and *Harding*.

## PER CURIAM.

The circumstances of this case are exceedingly few, and the question which it involves is in its nature of the very simplest kind.

The act on petition on behalf of the plaintiff, which is very properly confined to the facts which occurred at the time of the collision, states that the barge was coming up the river Thames with the tide, whilst the schooner was going down the river against the tide, with a south-west or favorable wind, and instead of getting out of the way, as she ought to have done, she ran into the barge stem on. The defence to the action contains no \*direct denial [ \*9 ] of this averment. The answer of the schooner is, that the barge had but one man on board; but by the evidence it is proved that there were two. It also further alleges, that the schooner was incapable of getting out of the way, because she was warped; and the answer concludes with a vast deal of irrelevant matter, setting forth alleged conversations which took place on the occasion, to the effect that the amount of damage was estimated at about 6*l.*, and that an offer was made to accept that sum, but without prejudice, as a compensation for the damage in question. Now, assuming that the tender was made as stated, it is impossible that I could take any notice of it in these proceedings. The court has no materials whereon to form a judgment as to whether it is equal to the damage which has been sustained; and even if it had, the course of justice would require that it should be referred to the registrar to ascertain the fact. With respect to the argument which has been urged, that cases have occurred in which such tenders have been admitted in salvage cases, it is to be observed that the distinction between salvage and damage by collision is superabundant. Moreover, even in cases of salvage, a tender would not be binding or conclusive unless it were made in court.

Dismissing, therefore, from my consideration the averments, in the answer to which I have adverted, the only point to be decided is who is to blame. The defendant has made an admission in his own plea, from which it is to be inferred that the damage was occasioned by himself. Does then the asserted fact, that the schooner was incapable of getting out of the way because she was warped, \*supply a sufficient exculpation to relieve the owners from [ \*10 ] making the indemnification which is claimed by the plaintiff in these proceedings? I am clearly of opinion that it does not. If a vessel chooses to avail herself of a particular mode of going down the river at a particular time, which renders it difficult to escape collision, if a collision does take place, she must bear the consequences of a contingency to which she has exposed herself. I,



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The Agricola. 2 W. Rob.

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therefore, pronounce for the damage, and refer the amount to the registrar and merchants, and I must give the plaintiff his costs.

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THE AGRICOLA, Grayson.

January 31, 1843.

In the case of a vessel taking up her berth in dock, the time and manner of dropping the anchor is exclusively within the province of the pilot.

Defence in a cause of damage upon this ground sustained in the case of a vessel entering the port of Liverpool and running foul of another vessel. Construction of Liverpool Pilot Act and the General Pilot Act, as laid down in the cases of The Maria and The Protector, supported.

THIS was a cause of collision promoted by the owners of the schooner The Don against this vessel, her tackle, &c.

The act on petition on behalf of the owners of The Don in substance pleaded — That The Don arrived off the King's Dock basin, at Liverpool, about noon on the 7th September last. That whilst in the act of warping into the dock, the master was ordered to drop astern, so as to permit an outward bound vessel to pass, which order was obeyed, the sails being at such time furled under the pier dock master's direction. That subsequent to the passing of the vessel, and whilst the crew were making every despatch to dock her, the barque Agricola suddenly appeared in sight, running under sail into the basin at the rate of about six miles per hour, having both the wind and tide strong in her favor; that she so continued [ \*11 ] running without letting go her anchor \* until she had got close upon The Don, and in consequence of such neglect on her part, not having been checked in time, ran full speed into The Don, doing the damage, &c.

On the part of The Agricola it was pleaded in answer — That when off Point Lynas a duly licensed Liverpool pilot was taken on board The Agricola, who took charge of the vessel and proceeded with her up to Liverpool. That at the time the barque rounded the rock, all her sails were furled with the exception of the fore topsail, which was double reefed. That as the barque proceeded up the river Mersey under the charge of the pilot, the fore topsail was by his direction clued up snug, previous to running into dock. That as the barque neared the entrance of the King's Dock basin, into which

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The Agricola. 2 W. Rob.

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the pilot intended to take her, he, as well as the master and crew, saw a vessel moored to the north pier-head, and when they rounded her and were about to run into the basin, they saw, for the first time, the schooner Don lying right athwart the basin. That although the pilot, master, and crew of The Agricola had kept a good look-out, it was impossible for them to see the schooner until they were at the entrance of the basin, as the tobacco warehouses and the vessels lying at the entrance obstructed the view. That the schooner was lying in an improper position, namely, close to the entrance of the basin, and right across it, her stern being within ten or twelve yards of the south wall, and with two hawsers out, which were fastened to the north pier-head. That the barque was in the entrance of the basin almost the moment those on board her saw the schooner. That it was impossible to let go the anchor of the barque in the entrance of the basin, as there is not \*sufficient room for [ \* 12 ] a vessel to swing between the pier-heads, but immediately on her getting inside, the crew of the barque let go the best bower, and fearing she could not be brought up in time, they put the helm hard aport, to endeavor to clear the schooner by going between her and the south wall, but the barque had so much way upon her, and the chain ran out so quickly, that before she could be brought up she struck the schooner on her larboard bow, and then ran against the south wall of the basin, where she was brought up. That the collision was imputable to the mismanagement of The Don in taking up the position which she did across the basin, and not to any one on board The Agricola, or if so, the same was occasioned by the default of the pilot, who was in sole charge of the barque. That by reason of the premises and of the provisions of the Liverpool Pilot Act, 5 Geo. IV., cap. 73, sec. 25, and of the General Pilot Act, in that case made and provided, the owners of The Agricola are not answerable for the damage, &c., &c.

A reply was given in on behalf of the owners of The Don, denying that the vessel was in an improper position as pleaded; also denying that the Pilot Acts pleaded in the answer of The Agricola applied under the circumstances of the case.

The case was argued upon the merits before Trinity Masters, by

*Queen's Advocate* and *Addams*, for the owners of The Don.

*Haggard* and *Bayford*, for the owners of The Agricola.

The Trinity Masters were of opinion that The Don was anchored

in a proper situation, under the direction of the dock-  
[ \* 13 ] master; and that the blame was \*attributable to The Agricola. Being expressly asked to give their decision upon the point, the Trinity Masters were further of opinion that the pilot on board The Agricola was solely responsible for the accident.

The question was subsequently raised upon the point of law, how far the statutes pleaded sustained the claim of The Agricola to an exemption from liability, and upon this point the court delivered the following judgment.

JUDGMENT.

DR. LUSHINGTON. I have already in former instances been called upon to consider the construction of the Pilot Acts, and in so doing, I had occasion to refer to the previous decisions which had been made with regard to those acts. In referring to those decisions, it was my misfortune to find that the interpretations put upon the statutes had not been uniform or consistent; and in this conflict of authorities in the cases of *The Protector*<sup>1</sup> and *The Maria*,<sup>2</sup> I felt myself bound to form my own opinion, and having bestowed the most anxious consideration upon the subject, to determine the question according to the best of my own judgment. It would not, I think, tend to throw any light upon the present case if I were to repeat the observations which I made in deciding those cases. Thus much, however, I may premise, in approaching the consideration of the question which I have now to determine, namely, that I shall continue to adopt the principles of law which I laid down in the cases of *The Protector* and *The Maria*, until my decision in those cases is overruled by a superior court, and by those principles I shall be guided in  
[ \* 14 ] determining the present \*case, unless any novelty should be found in its circumstances to raise a distinction in its favor.

What, then, are the facts of the case as they are disclosed in the evidence before the court? The mate of *The Agricola* states, in his affidavit, that the vessel having arrived from Calcutta in the river Thames, was proceeding from the Thames to the port of Liverpool; and it is to be collected from the affidavit of the dock master, that at the time she entered the port of Liverpool she was in ballast. It also further appears, that when entering the port of Liverpool, the master of *The Agricola* took a licensed pilot on board; that the collision in question occurred whilst such pilot was on board, and, in the

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<sup>1</sup> [1 W. Rob. 45.]

<sup>2</sup> [1 W. Rob. 95.]

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*The Agricola.* 2 W. Rob.

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judgment of the Trinity Masters, by whom the court was assisted when the case was heard upon its merits, such collision was occasioned entirely by the default of the pilot alone, and was not in any degree to be attributed to the misconduct or negligence of the master and crew.

This point was expressly submitted by the court to the consideration of the Trinity Masters, and they were of opinion that the whole blame lay with the pilot, and for this obvious reason, namely, that the collision arose from the course pursued by *The Agricola* in dropping her anchor on entering the port; and it was the exclusive duty of the pilot to decide upon the proper time and manner in which the anchor should be dropped. Under this state of circumstances, the question now arises, whether or not, under the Liverpool Pilot Act, or by the General Pilot Act, the owners of *The Agricola* are to be relieved from their liability to make good the loss which has been occasioned? In the act on petition, the owners of *The Agricola* have set forth \*the ground of their asserted exemption in the following [ \*15 ] terms: "That under the provisions of the Liverpool Pilot Act, 5 Geo. IV. cap. 73, sect. 25, and also the General Pilot Act in that case made and provided, the owners of *The Agricola* are not liable," &c. From these words, therefore, it is obvious, that the act 5 Geo. IV. is specifically referred to as a ground of defence, and the attention of the court is directly called to it. It is also equally clear, that the defence is not rested exclusively upon the Liverpool Pilot Act alone, but upon the Liverpool Act in conjunction with the General Pilot Act. In arguing the case, the same course of argument was pursued as was adopted in the cases of *The Protector* and *The Maria*; and the authority of the cases, *Carruthers v. Sidebottom*, and the *Attorney-General v. Case*, was again referred to.

The first question, then, which I have to consider is this: whether, under the provisions of the Liverpool Pilot Act, the master of *The Agricola* was bound to take a pilot or not? The court has been referred to the various sections of this act; and looking more immediately to the words of the 25th section, it is abundantly clear, that under that particular section, the master of *The Agricola*, being the master of a vessel inward bound, in the absence of a licensed pilot on board, would have been liable to pay full pilotage dues, unless his vessel was in ballast at the time of entering the port of Liverpool, and employed in the coasting trade. It is to be especially noticed, that both these particulars should be combined, in order to take away the penalty of full pilotage payment in the case of an inward bound vessel entering the port of Liverpool without a licensed pilot on board. How far \*are these essential facts established in [ \*16 ]

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the present instance? Looking to the pleadings in the cause I do not find them in any manner specifically set forth by the owners of The Don. They have contented themselves with simply denying that the 25th section of the Liverpool Pilot Act, and also the General Pilot Act, as pleaded, applies in this case; and their plea is defective in this respect, inasmuch that if it was intended to deprive the owners of The Agricola of their exemption from liability under the statute, upon the ground that the pilot was voluntarily, and not compulsorily taken on board, it should have been expressly pleaded, that The Agricola, although inward bound, was not compellable to take a pilot on board, because she was in ballast, and was engaged in the coasting trade. How, then, does the matter stand upon the evidence before the court? That The Agricola was in ballast at the time, must, I think, be considered as sufficiently established by the affidavit of the dock master, for this was a fact within his own immediate knowledge, and his assertion of this fact is altogether uncontradicted. With respect to the further averment to be found in his affidavit, "that she had just arrived from a coasting voyage," I am not disposed to place the same reliance upon the assertion of this witness, and for this reason, namely, that his information upon this point could only have been derived from the representation of others. If, therefore, there is any other evidence upon this point, to that evidence I must resort. Now the chief mate of The Agricola, in his affidavit, states to this effect: "That he shipped on board the vessel, and proceeded in her on two voyages; first, to Rio Janeiro and Calcutta, and back to London; and, [ \*17 ] secondly, to \* Port Phillip and Calcutta, and thence back to London; and afterwards from London to Liverpool."

Does this representation of the employment of the vessel bring it within the description of a coasting vessel, or of the principle upon which the masters of vessels engaged in the coasting trade are exempted from the necessity of taking a pilot on board? I am of opinion that it does not. In my apprehension, the principle upon which vessels engaged in the coasting trade are so exempted is this: That the masters of such vessels, from their occupation and experience, are supposed to be so familiarly acquainted with the English coasts, that it would be superfluous and oppressive upon the owners to impose upon them the necessity of employing a pilot on board. This consideration, it seems to me, could not, by any fair application of the principle, attach to the master of The Agricola, who, according to the testimony of the mate, had been employed for a length of time in voyages to foreign and far distant countries, and who, as far as the evidence goes, does not appear to have been engaged in the coasting trade at all. It has been suggested in the argument, by the counsel

for the owners of The Don, that The Agricola, having discharged the whole of her cargo in London, had completed the voyage from Calcutta in which she was engaged. That the voyage from London to Liverpool was consequently to be considered as a new and distinct voyage, and, being from one port of England to another, was fairly within the designation of a coasting voyage. Now, in one sense of the phrase, undoubtedly, a voyage from one port in England to another may perhaps be properly described as a coasting voyage; but, looking to the \* general intention of the legislature, and [ \* 18 ] also to the more immediate wording of the 25th section of the statute 5 & 6 G. IV. cap. 75, I am clearly of opinion that the voyage of this vessel from London to Liverpool, in the statutory definition of the term, cannot be considered a coasting voyage, so as to bring it within the exception marked out by the 25th section. The meaning of the expression "coasting voyage," in that section, according to my interpretation of the term, is to be confined to a trading from one British port to another. If this be so, the master of The Agricola, in case he had refused to receive a pilot on board, would have been liable to the payment of full pilotage dues, under the provisions of the 25th section of the act. He would, moreover, have been subjected to a further penalty under the provisions of the 20th section, the words of which are these: "shall make a signal, and take a pilot, or be liable to a penalty of 5*l*." Being, then, of opinion that the master of The Agricola was compelled to take a pilot, I have now to consider how far the owners of this vessel are exonerated from the consequences of such pilot's misconduct. In the investigation of this point in the case, I must look to the General Pilot Act, 6 G. IV. cap. 175. The Liverpool Pilot Act contains no express exoneration, and no construction has been put upon that act that, *per se*, it confers upon the owners any exemption from liability. The question then arises, is this responsibility taken away by the General Pilot Act? This question is obviously attended with no little difficulty, and for this reason, namely, that it has already been raised before the Court of King's Bench and the Court of Exchequer, and the judges of those \* courts entertained very different conclusions with respect to [ \* 19 ] the construction of the act of parliament; the Court of King's Bench holding that the general act did operate upon the Liverpool act, the Court of Exchequer as clearly holding that it did not. In determining this question in reference to the present case, I shall adopt the same course which I pursued in the case of The Maria, and, without taking upon myself the difficult task of deciding upon the conflicting opinions of such high authorities as the Court of King's Bench and the Court of Exchequer, I shall be guided by the general



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principle upon which my judgment was founded in the case of *The Maria*, namely, that wherever a man is compelled by the law to employ a particular individual in the performance of a given service, the law (which imposes the obligation upon him) must take away his responsibility for the acts of that individual whom he is so compelled to employ. Applying this principle to the circumstances of the case before me, I am of opinion that the defence of the owners of *The Agricola* is a valid defence, and that they have established their exemption from the responsibility of this collision.

Before I close my observations upon this case, I will shortly advert to an argument which has been urged by the counsel for the owners of *The Agricola*, that even if the taking a pilot on board was not compulsory, yet, if a pilot should be taken in pursuance of the provisions of an act of parliament, the liability of the owners, upon general principle, is thereby discharged. In support of this position, the court was referred to the decision in the case [ \* 20 ] of *Lucy v. Ingram*. Reference was also \* made to the case of *Milligan v. Wedge*, reported in the twelfth volume of *Adolphus & Ellis's Reports*. Now in the case of *Lucy v. Ingram*,<sup>1</sup> a pilot was taken voluntarily by the master of a vessel, and as such pilot was taken under the provisions of the statute, he being compellable to go on board if required, and the 55th section of the act having directed that no person shall be responsible for the acts of a pilot taken on board under the provisions of the statute, the Court of Exchequer was of opinion that, although the master was not compelled to take the pilot, yet, being taken by virtue of the statutory enactment, the owners were not responsible for the acts of such pilot. The case, therefore, of *Lucy v. Ingram* is clearly distinguishable from the case suggested, and I am not prepared to extend the principle upon which that case was decided to the case of a pilot voluntarily taken on board, under the provisions of the *Liverpool Pilot Act*, unless the act of 6 G. IV. applies to that act. Assuming that it does not apply, I am not prepared to say that, if the pilot had been voluntarily taken on board this vessel, the owners would not be responsible for the acts of that pilot. If the doctrine contended for be true, that the responsibility would not attach upon general principle, the discussions in the Courts of King's Bench and the Exchequer would have been unnecessary; and looking to the persons by whom the question was argued and determined in those courts, — the Chief Baron, Thompson, being one of the judges, than

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<sup>1</sup> In the Court of Exchequer. [6 Mees. & W. 302.]



whom a more careful judge never sat upon the bench, — I cannot but think that if such an argument \*would have [ \*21 ] held good, it would have been noticed in the argument of counsel, or adverted to in the judgment of the court.

With respect to the case of *Milligan v. Wedge*, I do not think that case will bear out the proposition in support of which it has been cited.

In that case, the purchaser of a bullock employed a licensed drover to drive it from Smithfield to the butcher's shop. The drover employed a boy, and mischief was occasioned through the careless driving of the boy so employed. The court held that the purchaser was not liable for the damage, and for this reason, namely, that by the bye-laws of London he was compelled to employ the licensed drover in the first instance; he had, therefore, no choice as to whom he should employ. Between that case, therefore, and the present case there is this distinction, that in the present case the owners of *The Agricola* might, by law, have employed their own master in navigating their vessel, subject to the penalties to which I have already adverted. In the case of *Milligan v. Wedge*, the purchaser was, *ex necessitate*, compelled to employ the licensed drover. The principle, therefore, upon which that case was determined does not apply in the present case. In deciding the present question, my judgment is founded solely upon the principle which I laid down in the case of *The Maria*, namely, that the master of *The Agricola* was bound to take the pilot on board, and the collision having been occasioned entirely by the misconduct of that pilot, the owners of *The Agricola* cannot be made responsible. I therefore dismiss them from this suit.

*Haggard.* With costs?

PER CURIAM. No, not with costs.

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<sup>1</sup> [This case is also reported in 2 Notes of Cases, 113.]

[ \*22 ]

\* THE LOUISA.<sup>1</sup>

(Motion.)

February 10, 1843.

In apportioning a salvage award, the court will not consider itself bound by an agreement made out of court between the owners and crew, prior to the time when the salvage service was rendered.

A scale of apportionment, drawn up under such an agreement, overruled, and a fresh apportionment made by the court.

THIS was a question as to the apportionment of a salvage remuneration, awarded by the court to the owners and crews of three fishing smacks.

The case, which was a case of derelict, was argued upon its merits, in Michaelmas Term, 1842, when the court awarded the sum of 1,200*l.*, the admitted value of the ship and cargo being 4,000*l.* It appeared that, at the time of hiring the crews, articles were drawn up by the owners and signed by the men, containing an agreement respecting the relative apportionment of all salvage awards between the owners and the crew. In pursuance of that agreement in this case, being a case of derelict, a particular scale of apportionment had been drawn up by the agent for the owners and crews, allotting 2*l.* to each of the mates, and 1*l.* to each of the seamen, in addition to the sums which they were entitled to receive under the articles. It also further appeared that an extra allotment had been made to the apprentices who were on board at the time of the salvage, and that payments had been made to them in advance, which, it was alleged, could not be legally recovered. Under these circumstances, the scale of apportionment drawn up by the agent was brought in, annexed to an affidavit, and the court was moved to confirm the same, and direct the sum to be paid out of the registry, to be distributed accordingly.

PER CURIAM.

[ \*23 ] An affidavit has been made in this case, to which \*1 must advert before I proceed to state my opinion upon the question which I have now more immediately to determine. The affidavit is made by Mr. Hewitt, who describes himself as the

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<sup>1</sup> [S. C. 2 Notes of Cases, 149.]

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The Louisa. 2 W. Rob.

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agent of the owners and crews of the three smacks; and he states that, in his character of agent, he has apportioned the salvage allotment already decreed by the court, according to the terms of an agreement made between the owners and the crew of the salving vessel at the time of hiring; and, in apportioning the same, he has allotted the sum of 2*l.* to each of the mates, and 1*l.* to each of the seamen, in addition to the sum which they would be entitled to receive under the articles. He also further states, that a proportionate additional allotment has been made to the apprentices who were on board the smacks at the time of the salvage; and that he has himself made sundry payments to these apprentices in advance upon such allotment, and that it will be impossible for him legally to recover the repayment of these advances.

Now the first question which I have to consider, in reference to this affidavit is this. Am I, in the judgment which I am now to pronounce, bound and concluded by the articles which are so stated to have been entered into between the owners and crews of these vessels? It would, I conceive, be repugnant to general principles, and highly prejudicial to the public interests, if such a proposition could be legally maintained in cases of this description. What would be the effect of it? The effect would be to take away from actual salvors the motives to all enterprise and energy. Until, therefore, I am compelled by superior authority, I never will consider articles of this nature, made previous \*to the perform- [ \* 24 ]  
ance of the salvage service, binding and conclusive upon my judgment. I will now very shortly advert to the original decree of the court, and to the scale of apportionment which has been brought in, annexed to the affidavits in the case. When this cause was heard upon its merits in the first instance, the court allotted a sum of 1,200*l.*, with a direction that 20*l.* should be retained for the purpose of indemnifying the crew of the vessel saved, for certain articles of clothing which had been left on board when the vessel was abandoned, and which, it would seem, had been appropriated by the salvors in the performance of the salvage service. The original sum, therefore, to be distributed was 1,180*l.*; but from this sum a further deduction has been made of 82*l.* for agency expenses, leaving the net sum, upon which I am now asked to decree an apportionment, in the amount of 1,100*l.* As the deduction for the agent's expenses has not been objected to, I shall make no particular observation upon it. Thus much, however, I may state: that if the court were called upon to give an opinion upon a deduction of this kind, I should undoubtedly refer the consideration of the matter to the registrar and merchants.

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I now come to the scale of apportionment, upon which I am asked to decree the distribution of the remaining 1,100*l.*; and, certainly, looking to former precedents and to the circumstances of this particular case, I feel that, in affirming the arrangement, I should act in violation of all precedent, and in contradiction to the rules and principles which have been laid down by former judges [ \*25 ] of this court, in cases of this description. I have \*referred

to a variety of cases in which salvage remuneration has been apportioned by the learned judges who have preceded me in this chair, and I find that the utmost amount ever decreed to the owners has been a moiety of the sum awarded. In the case of *The Albion*,<sup>1</sup> which was one of the last cases decided by Sir John Nicholl, that learned judge had to consider the apportionment of a salvage award between the owners, master, and crew, under circumstances much resembling the present case; for it was the case of a vessel engaged in the occupation of fishing. In delivering his judgment, Sir J. Nicholl drew a distinction between steam vessels and other vessels; and he allotted to the owner seven twentieths, — observing, at the time, that if a scheme for the apportionment of salvage could be agreed upon by counsel, he would make it a rule of court. I extremely doubt, in my own mind, whether it would be practicable, looking at the varying circumstances of this class of cases, to establish any rule of court on the subject which could be binding in all cases. It is necessary to look to the particular services rendered in each case, and then to apportion the salvage reward according to the facts and circumstances emerging from that investigation. If the service has been rendered at great loss or risk to the vessel herself, the owners of that vessel are fairly entitled to a greater proportion of reward than when she is merely auxiliary to the service.

What then are the circumstances of the present case? The sum to be apportioned has been divided by the agent into 300 shares, and of these shares seventy shares have been apportioned to [ \*26 ] each of the owners of the three smacks, giving to \*these owners the sum of 786*l.* 12*s.*, out of a gross total of 1,180*l.*; in other words, nearly two thirds of the whole salvage remuneration. The scale of allotment then gives to each of the three masters ten shares, amounting to 109*l.* 16*s.*; to the three mates five shares each, amounting to 54*l.*; to five seamen, each five shares, amounting to 91*l.* 10*s.*; and lastly, to thirteen apprentices each a share and a half,

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<sup>1</sup> [3 Hagg. Ad. Rep. 254.]

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amounting to 73*l.* 4*s.* Such is the arrangement proposed in the scale of apportionment which has been drawn out for the court's acceptance, and to which, as I have already stated, I do not feel myself justified in yielding my concurrence. I have been reminded of the occupation of the three vessels engaged in this service, and it has also been urged upon the court that partial advances have been made by the agent in pursuance of the proposed arrangement, and that great difficulty will be experienced by Mr. Hewitt in recovering from the apprentices, who are minors, the money which has been advanced. Of the latter circumstance I can take no notice in the present instance; if the agent has made the asserted payments in his own wrong, and at his own risk and hazard, he must also take the risk of recovering it from the parties to whom such payments have been made. I have taken into my consideration the fact that the three vessels were engaged in fishing at the time, and I am of opinion now, as I was formerly, when I apportioned the salvage award in the case of *The Deveron*, that the owners of fishing vessels are entitled to a more liberal allotment than the owners of other vessels, because their occupation is interrupted, and secondly, because the expense of navigating them is larger than in ordinary cases, so far \*as regards the wages of the mariners. Taking, then, [ \* 27 ] the case of *The Deveron* as my guide, I shall adopt the same rule as I pursued in that case with regard to the owners. In that case, 1,600*l.* was awarded, and I gave the owners 700*l.*, or seven sixteenth shares. The same proportion I now allot to the owners of the three fishing smacks. With regard to the proportions of the masters, mates, seamen, and apprentices, I am not inclined on the present occasion to disturb the arrangement with which they are themselves satisfied. The apportionment then will be as follows:

To the owners	.	.	.	£480	7	6
To the 3 masters	.	.	.	205	17	6
To the 3 mates	.	.	.	102	18	9
To the 5 seamen	.	.	.	171	11	3
To the 13 apprentices	.	.	.	137	5	0

I shall only allow the money to be paid out according to this scale of distribution, and there must be a fresh power of attorney from the parties interested authorizing the receipt of the same, and the parties must have full knowledge of all the present circumstances.

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The Columbine. 2 W. Rob.

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THE COLUMBINE,<sup>1</sup> Norwood.

February 10, 1843.

Trinity-House regulation upheld.

Defence of a steamer for not porting her helm, overruled, and damages pronounced for.

THIS was a cause promoted by the trustees of the Newcastle General Shipping Company, the owners of the brig Undaunted, against The Columbine, her tackle, &c., for damage by collision at sea.

The act on petition, on behalf of The Undaunted, in substance pleaded— That on the 23d September last, the brig sailed [ \*28 ] from London in ballast, bound \*to Newcastle-upon-Tyne, and having encountered contrary winds, arrived in the Swin about six o'clock, P. M., of the 2d October following, where she cast anchor at low water, intending, when the ebb tide again commenced, to proceed on her voyage. That about half-past twelve o'clock, A. M., of the following day, the anchor was weighed, and the said vessel stood N. W. by N. for about ten minutes, when she tacked and stood on the larboard tack close hauled upon the wind, with all her sails set, lying E. by S., the wind blowing a moderate breeze from the N. E. by N., and the said vessel going through the water about three and a half knots. That the night was fine and clear, and vessels under sail could be seen about a mile distant, and that a good look-out was kept by the crew—all hands, with the exception of the mate, who was sick below, being on deck, and the master at the helm. That about five minutes before one, A. M., a steam vessel (the vessel proceeded against) was observed by the master and crew coming in an opposite direction about one point and a half on the brig's larboard bow, to wit, E. half N., and going at the rate of about ten knots. That the brig continued her course, her master and crew loudly hailing those on board the steamer to warn them of the brig's approach; but notwithstanding such hailing, the steamer, instead of altering her course, closed in upon the brig, and a collision being thereby inevitable, in order to prevent the steamer from running the brig down, the helm of the brig was starboarded; but the steamer, however, struck the brig a violent blow on the starboard bow, carry-

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<sup>1</sup> [S. C. 2 Notes of Cases, 144.]

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ing away her jib-boom, and greatly damaging her bowsprit and hull, &c. That the \*blame of such collision is wholly [ \* 29 ] imputable to the persons on board the steamer, &c., &c.

The reply on behalf of The Columbine set forth—That the steamer was on a voyage from Rotterdam to London, when about three-quarters past twelve o'clock, A. M., on the morning of the 3d of October, the morning being dark and somewhat hazy, The Columbine being in the Swin, off the Essex coast, between the Sunk Sand and the Gunfleet Sand, and nearly abreast of the Gunfleet beacon, about four or five miles above the Sunk Light, and steering W. half S., observed The Undaunted between two and three points on her starboard bow, steering upon the wind, and distant from The Columbine three or four vessels' length, and which could not have been seen at any greater distance on account of the darkness and the haziness of the weather, the brig not having any light hoisted. That a good look-out was kept on board The Columbine by the watch on deck, consisting of the master, who was upon the quarter-deck near the wheel, a seaman at the wheel, the second mate upon the bridge between the paddle boxes, and two seamen at the forecastle on the bows, with an engineer at his post in the engine room, and a man over the engine to convey orders to the engineer. That The Columbine had at the time three lights hoisted—two at the cross-trees at the mast-head, and one under the bows—which lamps, from their size and brilliancy, were plainly visible at a considerable distance, and by which a vessel coming in an opposite direction, and keeping a good look-out, might have ascertained the course which The Columbine was steering in sufficient time to have regulated her own course accordingly. That on the \*brig being seen on [ \* 30 ] the starboard bow of The Columbine, she was loudly hailed to put her helm hard astarboard, and the helm of The Columbine was immediately starboarded; and orders were given by the commander of The Columbine to stop the engines, and these orders were instantly obeyed. That had the brig's helm been put astarboard when she was hailed to that effect, and which, from her being under complete command, in the then state of the wind, she could have done, no collision would have ensued. That no hailing by those on board the brig was heard by the crew on the deck of The Columbine, until after the collision had taken place; and if The Columbine, instead of altering her course, had closed in upon the brig as alleged, The Columbine must have struck the brig upon the larboard bow, instead of the brig, as the fact was, striking The Columbine on the starboard side. That the said collision was occasioned



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The Columbine. 2 W. Rob.

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solely by the negligence and misconduct of those on board the brig, &c.

The case was argued before Trinity Masters, by

*Haggard* and *Robertson* for The Undaunted.

*Addams* and *Robinson* contra.

PER CURIAM.

In the course of the argument which has been addressed to the court by the counsel for The Columbine, it has been urged in the present instance that the burden of proof, in cases of this kind, rests upon those who prefer the claim to be indemnified for the damage which has been occasioned by the collision. This position is undoubtedly true to a certain extent; at the same time it is also equally true, that [ \* 31 ] if a defence is set up by the vessel proceeded against, the owners of that vessel, in order to establish their exemption, must prove the facts upon which they rely for their defence. Bearing in mind this consideration, gentlemen, let us now examine some of the facts of the case as they are stated in the evidence before the court, and then let us consider what is the proper conclusion to be deduced, both as regards your nautical knowledge, and the inference which the law would draw from them. It is stated on behalf of The Undaunted, "that on the morning of the 3d of October she weighed anchor, and after having stood for a short time to the N. W. by W., she tacked and stood on the larboard tack close hauled, her course lying E. by S., and the wind blowing a moderate breeze from the N. E. by N., the said snow going at the time at the speed of about three and a half knots." This statement on behalf of The Undaunted is not impugned. I will now advert to the position of The Columbine, as it is represented in the statement of the owners of that vessel. From their own statement it appears that the steamer at the time in question was in the Swin, off the Essex coast, between the Sunk Sand and the Gunfleet Sand, and was nearly abreast of the Gunfleet beacon, steering a course W. half S., and running at the rate of about seven knots. It appears, therefore, that The Undaunted was proceeding down the river close hauled, and the steamer was coming up the river with the wind abaft her beam; and such being the respective positions of the two vessels, it is obvious that, under the circumstances, the general rule of navigation would be that the [ \* 32 ] steamer must give way. This has indeed been admitted by the counsel for The Columbine, but the defence which they have set up is rested upon several grounds; first, it has been

contended that the night was so dark that the crew of The Columbine (supposing them to have kept a good look-out) could not descry The Undaunted at a greater distance than three or four ships' lengths; and secondly, that when first discovered, The Undaunted was seen two or three points on the starboard bow, and, therefore, they were justified in starboarding and putting their helm to port. It has also been argued that, even if this defence should fail, The Undaunted was also to blame in omitting to hoist a light when she first perceived The Columbine, and in that she ought to have starboarded her helm sooner. The defence of The Columbine then divides itself into two parts—a case of necessity, in which the master of that vessel adopted the best measures in his power to avoid the accident in question,—and a charge against The Undaunted. Let us now see how far the facts of the case will bear out the conduct of The Columbine. It is admitted that she starboarded her helm, and that she called upon The Undaunted to starboard her helm likewise, contrary to the general rules of navigation. With respect to the darkness of the night, the witnesses for The Columbine are somewhat at variance with each other. The master in his evidence describes the night as dark and somewhat hazy. This is the sum total of his representation. Some of the other witnesses, again, say that it was very dark; but they are directly contradicted by the witnesses on the part of The Undaunted, who depose that it was a clear night. Assuming for the moment that the master's representation is correct, \*and that the night was rather hazy, I [ \* 33 ] cannot but think that if a good look-out had been kept on board The Columbine, she ought to have perceived The Undaunted at a somewhat greater distance than is described in the proceedings in this cause. Again, with respect to another ground of justification set up by the owners of The Columbine, that when first descried The Undaunted was seen from the starboard side of The Columbine. For the purpose of doing perfect justice to The Columbine, I will assume that she actually did see The Undaunted from two to three points upon her starboard bow. Does that make any difference? In my opinion, subject to your better judgment, it does not. This point has been discussed in this court more than once, in former cases of this kind, and it has been laid down by the Trinity Masters—and my mind has always concurred in the propriety of the doctrine—that if vessels are approaching each other, and there is a probability of a collision, the general rule of navigation is strictly to be adhered to. I am, therefore, of opinion that neither the alleged haziness of the night, nor the point from which The Undaunted was descried, affords a sufficient justification for the conduct of The Columbine in departing from the admitted rule of navigation upon the present

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The Lochiel. 2 W. Rob.

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occasion. With respect to the remaining part of The Columbine's defence, that The Undaunted was in fault in not hoisting a light and not starboarding her helm, — I must leave the decision of these questions to your nautical judgment and experience, and be guided by your opinion how far these measures were proper and necessary to have been adopted under the circumstances of the case.

[ \* 34 ] Taking all these matters into \* your consideration, you will have the goodness to inform me whether The Columbine was solely to blame, or whether any blame attaches to The Undaunted.

The Trinity Masters being of opinion that The Columbine was solely to blame, the court pronounced for the damages with costs.

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THE LOCHIEL, Miles.

February 21, 1843.

Advances made to the master for the repairs and service of a British ship in the port of Cowes, the owners being resident at Newcastle, cannot be made the subject of a bottomry transaction.

An alleged bond of bottomry given at Rotterdam pronounced against, upon the ground that the advances were made for the repayment of debts incurred by the ship in a former voyage, and also that such advances were not necessary for the immediate exigencies of the ship.<sup>1</sup>

THIS was a question upon the validity of a bottomry bond<sup>2</sup>

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<sup>1</sup> [Same case, 2 Notes of Cases, 177. For cases where the question of necessity was raised, 1 Hagg. Ad. R. 169; 1 Ib. 320; 3 Ib. 250; 1 W. Rob. 1; Ib. 29; 2 Ib. 320; 3 Hagg. Ad. R. 75, 86; 3 Ib. 66; 3 Ib. 331; 3 Ib. 387; 3 Ib. 404. The Aurora, 1 Wheat. 96; The Virgin, 8 Pet. 538; The Fortitude, 3 Sumn. 228.]

<sup>2</sup> *Form of the Bottomry Bond in question.*

“Whereas the said brig, in a former voyage, with a cargo of coals from Newcastle, bound to Exeter, met with very rough and tempestuous weather, and in consequence of losses and damages sustained thereby was reduced to necessity of putting into the port of Cowes, where the cargo was discharged and ship repaired; and, whereas I, the said William Miles, having no funds to pay the charge incurred thereby, did borrow the necessary funds for that purpose from James Pow, of Newcastle, merchant, to the amount of one hundred thirty-nine pounds ten shillings eight pence, lawful money of Great Britain, for which amount I, the said William Miles, signed a promissory note, dated at Newcastle-upon-Tyne, the seventeenth day of May, one thousand eight hundred and forty-two, payable at Rotterdam on demand; and, whereas, afterwards the said J. Pow advanced to me, the said William Miles, in behalf of the said ship Lochiel, a further sum of forty pounds nineteen shillings, in order to supply the said ship with new sails and ropes, and to enable her to proceed on a voyage to Rotterdam; and, whereas I, the said William Miles, on my arrival at Rotterdam, was not in a position to pay the

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granted by the master, at Rotterdam, in June, 1842. The bond was opposed by \*a mortgagee to whom the ship had [ \*35 ] been assigned, with a power of sale, in the year 1841.

On behalf of the bondholder, it was alleged in the act on petition — That in June, 1842, the brig Lochiel being at Rotterdam, and about to proceed on a voyage to Newcastle, the master being without funds, or credit to raise such funds as were requisite to protect the ship from seizure for debts incurred, and to which she was liable by the laws of Holland, and to enable her to proceed to sea on her intended voyage, borrowed of Messrs. D. & Co., merchants, of Rotterdam, the sum of 2,940 Netherland guilders, and for repayment thereof, together with a premium of eight per cent., executed in favor of the said Messrs. D. & Co. the bottomry bond in question in the cause. That the bond was duly indorsed and assigned to J. P., the promoter of the suit, who has in vain demanded payment thereof since the arrival of the ship in this country.

On behalf of the mortgagee, it was set forth in his answer to the act on petition — That in February, 1842, the vessel was chartered by J. P. to \*take a cargo of coals from Newcastle [ \*36 ] to Exeter. That while on such voyage she was obliged to put into Cowes for repairs. That J. P., the charterer, having arrived at Cowes, the cargo was sold; and money was advanced by said J. P. for the completion of the necessary repairs. That the brig returned to Newcastle, and about the 17th May, 1842, the master gave to the said J. P. a promissory note, payable at Rotterdam, for the sum of 130*l.* 10*s.* 8*d.* being the promissory note mentioned in the bond in question in the suit.

That subsequently thereto the brig, being chartered by J. Reid, of Newcastle, to carry a cargo of coals to Rotterdam, sailed from Newcastle, having on board one D., a brother-in-law of the said J. P., and

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amount of the above-mentioned promissory note, (which in consequence thereof was protested for non-payment,) nor also the further amount of forty pounds nineteen shillings advanced to me as aforesaid; and, whereas, both the aforesaid sums were paid off to the said James Pow for and on account of me, the said William Miles, by Messrs. R. and J. Dobree, of Rotterdam, merchants; and the said Messrs. R. and J. Dobree advanced to me an additional sum of fifty pounds sterling to defray the port charges and other expenses of the aforesaid ship Lochiel, at Rotterdam, and to enable her to proceed on a voyage thence to Newcastle, where she is now bound.

“Know ye,” &c. (The remainder of the bond contains the usual stipulations and covenants.)

who introduced the master to Messrs. D. & Co., upon the arrival of the ship at Rotterdam. That after the brig had discharged her cargo, and the broker of J. Reid, the charterer, had paid all port and other dues to which the vessel was liable upon coming to Rotterdam, the master received from the said broker, on or about the 14th of June, the balance of the freight, amounting to about 10*l.* and sailed on the next following day for England. That in order to complete the brig's provision and equipment for her return voyage to Newcastle, and make all the disbursements for the same, the master did not require nor expend a sum amounting to 20*l.* over and above the balance of the freight which he had received.

The answer then, in conclusion, denied the averment in the act on petition, that the advance of the 2,940 guilders by the Messrs. [ \* 37 ] D. was \* necessary in order to protect the ship from seizure for debts, &c., or that the said sum was justly advanced upon bottomry, if at all advanced to the said master.

A reply was given on behalf of the holder of the bond, alleging that the sum of 139*l.* 10*s.* 8*d.* mentioned in the act on petition was *bonâ fide* advanced by J. P. for the service of the ship, as was also a further advance of 40*l.* 19*s.* subsequently advanced by the said J. P., and the whole of the moneys so advanced were necessarily expended in the repairs and service of the vessel. That the brig, upon her arrival at Rotterdam, was liable by the law of Holland in respect of such advances, which the master was incapable of defraying, save by means of a loan upon bottomry. That it was in consideration of the advances so raised by him to protect the ship or vessel from seizure, as also to cover a further advance, to wit, of 50*l.*, in liquidation of necessary disbursements of the ship at Rotterdam, then and there *bonâ fide* made by Messrs. D. & Co., that the bond in question was duly executed by the master, &c., &c.

These averments in the reply were denied in a rejoinder, and the rejoinder further pleaded— That on the 16th of August, 1841, the bills of sale to the mortgagee were marked at the custom-house, in order to have the particulars thereof indorsed upon the certificate of registry of the said vessel, so soon as the same could be produced, and that it was not until some time after the return of the said vessel to Newcastle from Rotterdam that J. P. gave up the said certificate to the agent of the said mortgagee, and that until such time he had not been able to obtain possession thereof.

[ \* 38 ] \* In support of the bond, *Addams* submitted— That one feature in the opposition which had been raised against the payment of the bond was deserving of notice, namely, that the objec-

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tions which had been taken to its validity were not taken by the owners of the vessel, who were entirely lost sight of, but by a mortgagee under an asserted previous deed of assignment. That although the assignment in question purported to have been made in August, 1841, the only evidence of this fact was contained in the affidavit of the mortgagee himself. That no mention of the circumstance was to be found in the deposition of the master; and surely the fact must have been communicated to him, either by the mortgagee, or by the owner of the ship, if any such transaction had *bonâ fide* taken place. That even assuming the assignment to have been actually made as stated, the case set up by the party opposing the bond was defective in this respect, that it did not supply any evidence to show that J. P. or the Messrs. Dobree, the parties more immediately interested under the bond, were aware, when they made advances on the ship's account, that any previous mortgage upon the vessel was in existence. That the course pursued by the asserted mortgagee in lying by till the last moment, and now for the first time setting up the case detailed by him in his answer to the act on petition, was somewhat suspicious, and did not entitle his opposition to a very favorable reception from the court.

That as regarded the *res gestæ* of the case, and the evidence adduced on the one side and the other, the balance of credibility was decidedly in favor of the case set up by the holder of the bond.

\* That in respect to the original advances stated to have [ \* 39 ] been made by J. P. in this country, previous to the ship's departure for Rotterdam, it was expressly averred in the act on petition, and supported by affidavit, that the money was *bonâ fide* advanced, and expended in the service of the ship; and this statement was confirmed and verified by the accounts which had been brought in.

\* PER CURIAM.

How did the promissory note to cover these advances become payable at Rotterdam ?

*Addams.* I really do not know. It must be remembered that, in supporting this bond, I do not in point of fact represent J. P., but the Messrs. Dobree, in whose favor the bond was executed by the master at Rotterdam.

The learned counsel further submitted in continuation of his argument — That the real and true issue in the case was not whether a bond of bottomry could have been legally taken by J. P. for the advances made in this country, but whether the advances asserted to have been made by the Messrs. Dobree were *bonâ fide* made in con-



sideration of the bond, and for the service of the ship. That the evidence upon this part of the bondholder's case was most explicit and satisfactory. That the Messrs. Dobree positively and distinctly swore in their affidavit that it was so advanced, and their statement derived no small corroboration from the *res gestæ* of the case, and their own conduct throughout the whole proceeding. That no attempt had been made upon their part to mystify or conceal any portion of the transaction which occurred between themselves and the [ \*40 ] master at Rotterdam. \*They stated all the circumstances fully and fairly in their affidavit, and the same facts were also detailed in the bond itself. That the evidence on the other side was confined to the testimony of the asserted mortgagee and Miles the master. That in respect to what had been sworn by Mr. Cannon, it was objectionable in two respects; first, that it was principally composed of matter altogether irrelevant and beside the issue in the suit; and secondly, that in the only part of it which directly referred to the case in question, namely, the contents of the last sheet, the explanations which it purported to supply as to the reason why the mortgage was not indorsed upon the ship's certificate of registry, in August, 1841, was deficient and unsatisfactory, inasmuch as it did not explain nor account for the whole period which intervened between the asserted assignment of the ship, and the indorsement of such assignment upon the ship's register; that, in regard to the affidavit of the master, the greater portion of it was clearly inadmissible as evidence in the cause, inasmuch as it deposed to matters not set up in the pleadings, and although he swears that he did not require more than 10% or 15% beyond the balance of the freight to enable him to put to sea, a material disparagement to the truth of his statement was to be deduced from his own admission that, in order to obtain the money, he was willing to accept of 50%, and still more from the fact that he actually did accept that sum; that his evidence was, in consequence, not entitled to much credit from the court. The learned counsel then further referred, at some length, to the items of the accounts, and the affidavits of two Dutch advocates upon [ \*41 ] the \*law of Holland, with respect to the liability of the ship's detention and arrest, under the circumstances of the case; and contended, in conclusion, that the vessel having been clearly liable to arrest and detention by the law of Holland, and the money being *bonâ fide* advanced by the Messrs. D., to extricate her from her difficulty and to supply further exigencies, the bondholder was entitled to the payment of the bond.

*Haggard, contra*, for the mortgagee. That the reason why no

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appearance had been given for the owner in these proceedings was sufficiently explained by the fact that the beneficial interest in the vessel was exclusively vested in the mortgagee, and that, under the recent statute, he had a clear legal right to come into court, and contest the validity of a bond set up under the circumstances of the case; that although much argument had been advanced on the other side, in support of the transactions which had given rise to the bond in question, it was somewhat remarkable that the contents of the bond itself had never been directly adverted to, nor distinctly brought under the notice of the court. It was also deserving of notice, that the promissory note, which constituted the primary foundation of the negotiations between the Messrs. Dobree and the master, was not brought forward in the cause, and no explanation was furnished why such promissory note had been made payable at Rotterdam; that, as regarded the transactions stated to have occurred prior to the departure of the ship for this country, the whole *res gestæ* of the case sufficiently proved that the original advances by J. P., at Cowes, \*even if made, as alleged, for the service of the [ \*42 ] ship, were not made upon the security of the ship, but upon the personal security of the master; that, with respect to the further sum of 40*l.* 18*s.*, asserted to have been advanced at Newcastle, such advancement, if made, was made by J. P., without any security at all; that these advances could not have been made the foundation of a bottomry transaction at the time when the promissory note was given in the first instance; and if, in lieu of such promissory note, a bond to the same amount had been executed by the master, at Newcastle, the payment of such a bond could never have been enforced by proceedings in this court; that, with respect to what subsequently took place at Rotterdam, it was equally clear that the circumstances disclosed, both upon the face of the bond and in the statement set forth by the bondholder himself, were wholly insufficient to sustain the validity of the bond in issue; that the instrument in question was invalid in two most important respects: in the first place, because a great proportion of the pretended advances upon the bond was ostensibly made for purposes not within the scope of a bottomry transaction, namely, the repayment of debts incurred on account of the ship prior to the voyage in which she was engaged at the time those advances were made; secondly, that the remaining portion of the advances were made without necessity, and, if the master's evidence was to be received, were forced upon the master's acceptance.

The learned counsel then referred, at some length, to the contents of the bond and the evidence of the master, and also to



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[ \* 43 ] the affidavits in the \* cause ; and, in conclusion, he submitted — That the attempt to enforce the payment of the bond, by the proceedings in the cause, was a desperate and concerted attempt between the Messrs. Dobree and J. P., to obtain the repayment of the money originally advanced by J. P., at the expense of the mortgagee, and which could only be justly dealt with by the court, in the rejection of the bondholder's claim and his condemnation in the cost of the proceedings.

JUDGMENT.

DR. LUSHINGTON. In this case, which comes before the court under very peculiar circumstances, a considerable difficulty is interposed, from the fact that the plea given in by the mortgagee in the cause is not so full, in the statement it sets forth, as the affidavits which have been sworn in support of it. I allude more particularly to the affidavit of Miles, the master ; and, in delivering my opinion, I shall endeavor to avoid relying upon any of the statements contained in the affidavit of this witness, which do not fairly fall within the scope of the pleading itself. The bond in question bears date the 7th of June, 1842, and it commences by reciting : — That the vessel, belonging to the port of Newcastle, had set out on a voyage with a cargo of coals, bound from that port to the port of Exeter ; that, having incurred damages from the tempestuous state of the weather, she was compelled to put into the port of Cowes, where the cargo was unladen and the ship was repaired ; that Miles, the master, having no funds to defray the cost of such repairs, borrowed money from Mr. P., for the service of the ship, to the [ \* 44 ] amount of 139*l.* 10*s.* 8*d.*, \* for which he signed a promissory note, dated at Newcastle-on-Tyne, 17th May, 1842, and payable on demand at Rotterdam, — and the said J. P. also advanced a further sum of 40*l.*, to enable the vessel to proceed on her voyage to Rotterdam ; that, upon her arrival at Rotterdam, the master was not in a condition to pay the amount of the promissory note, or the further advance of 40*l.*, and the note was, in consequence, protested for non-payment. The bond then further recites : — That both these sums were paid to J. P., on the master's account, by the Messrs. Dobree, merchants, of Rotterdam, — and the said Messrs. D. also advanced an additional sum of 50*l.*, to enable the ship to return from Rotterdam to Newcastle ; and it concludes with the formal hypothecation of the vessel for the repayment of the several advances, amounting, together, to between 200*l.* and 300*l.* sterling, with a premium of eight per cent. Such being the general character of the bond in question, and such the outline of the circum-

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stances under which it was executed by the master, the first consideration which presents itself is this, namely, how far this court can enforce, either wholly or in part, a bond of this description. In respect to the advances which are alleged to have been made for the service of the ship by Mr. P., at the port of Cowes, it is perfectly clear, assuming the owners of the vessel to be resident at Newcastle, that no bond of bottomry could have been legally given by the master for any such advances in any port of this country, and no attempt has been made to take any such bond in the present instance. It is contended, however, that the promissory note for the 139*l.* 10*s.* was made payable, and became due, at Rotterdam; \*and, not having been discharged by the master [ \*45 ] on the ship's arrival in that city, the parties to whom the promissory note was assigned might, by the law of Holland, have arrested the vessel, and might have detained or sold her, for the purpose of enforcing the repayment of the 139*l.* 10*s.* 8*d.* Admitting the law of Holland to be as stated, for the purpose of this discussion, would this circumstance entitle the Messrs. Dobree to convert the promissory note into a bottomry security, by making the payment of it the subject of a bottomry transaction? I apprehend not. I know of no case which has decided that a vessel can be validly hypothecated for debts incurred prior to the immediate voyage in which she is engaged at the time when the bond of bottomry is given. Lord Stowell, when he decided the case of *The Augusta*,<sup>1</sup> entertained great doubt, in the first instance, whether a vessel could be legally hypothecated merely to avoid her detention; but, upon subsequent consideration, he was inclined to hold that it might be an additional reason for hypothecation, and that opinion I also adopted, in a case which came under my own consideration.<sup>2</sup> But neither Lord Stowell, to the best of my belief, nor I myself, have ever laid it down that a bond of bottomry could be validly given for the payment of debts which had been incurred by a vessel on a former voyage, and for a different purpose. What would be the consequence of the doctrine that a bond could be so given? If the position could be supported, the effect would be, that any debt contracted by the master in England, for the service of his \*ship, upon the personal security of the owners, might, by [ \*46 ] being made payable abroad, as in the present instance, be converted into a case of hypothecation. It is unnecessary for me to pursue this point any further in the present instance; because I am

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1 [1 Dod. 283.]2 *The Vibilia*, 1 W. Rob. 1.

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satisfied in my own mind that, under the circumstances disclosed upon the face of the bond itself, it would be impossible to hold those portions of the bond to be valid which regard the 139*l.* 10*s.* 8*d.*, and the additional 40*l.*, alleged to have been advanced by J. P., before the ship sailed from this country. With respect to the sum of 50*l.*, which is stated to have been advanced at Rotterdam for the purpose of enabling the ship to return to this country, it is possible that the bond might be valid for this sum, although invalid for the others. It is, therefore, incumbent upon me now to examine more particularly the circumstances of the case, as they are detailed in the evidence before me. Who are the parties before the court? The first party in the suit is Mr. P., the person to whom the promissory note was originally given, and by whom the advances at Cowes were made. As assignee of the Messrs. Dobree, who have become bankrupts, the bond in question has been assigned to him, and he is the party now proceeding to enforce the payment of it, as plaintiff in the present suit. Who is the other party? The person by whom the bond is opposed is a Mr. Cannon, who, according to his own statement, is a mortgagee of the ship by means of the transfer of divers mortgages, made to him in the month of August, 1841. It may here be noticed that, in the act on petition on behalf of the bondholder, an averment is introduced to this effect, — That, [ \* 47 ] whatever \* be the title of the mortgagee, no indorsement of the alleged mortgages was inserted upon the ship's register until after the commencement of this suit, in the month of August, 1842. Now it appears that, although the actual indorsement was made upon the 25th of July, 1842, Mr. Cannon distinctly avers in plea, and swears in his affidavit that he did, on the 16th of August, 1841, exhibit the several indentures, or bills of sale, at the custom-house, for the purpose of their being entered on the certificate of the registry of the ship, as soon as such certificate could be produced; but that it was not until some time after the return of the vessel from Rotterdam that the possession of such certificate could be obtained from Mr. P. This explanation comes in by way of reply to Mr. P.'s statement, and, as it is not contradicted by him, I must suppose the facts to be as stated; that the original title of the mortgagee, in point of fact, commenced in August, 1841, although it was not until 1842 that it was rendered more perfect and more regular in point of form.

*Addams*, in explanation. The application to Mr. P. for the certificate was not made until after the vessel had gone to Rotterdam, and at such time the certificate was in the possession of the master.

The COURT, in continuation. How am I to know that? I cannot receive an *ex parte* explanation, without regard to the evidence in the cause. The evidence of the mortgagee states that an application was made for the ship's register, for the purpose of having these indentures indorsed upon it, and no counter evidence is \* before the court to contradict this statement. If Mr. P. [ \* 48 ] had intended to put in issue the period of time when such application was made, or the period of time at which it came to his knowledge, that any such mortgage deeds were in existence, he should have specifically pleaded the matter upon which he intended to rely. As regards the question in issue, it does not, I confess, appear to me of any importance to ascertain the precise period of time at which Mr. P. was first made acquainted that any such mortgage deeds were in existence. If he did not know of the transfer of the mortgages to Mr. Cannon, he knew that there were mortgages upon the vessel, and that the interest of the owner in the ship was mortgaged to the fullest extent. It is impossible, therefore, to contend for a single moment that Mr. P. was not sufficiently aware that this vessel was subject to mortgages. What takes place under these circumstances? It appears that, early in the month of February, 1842, the vessel is chartered by Mr. P., for the purpose of carrying a cargo of coals from Newcastle to Exeter. She encounters tempestuous weather on the voyage, and, meeting with damage, is carried into the port of Cowes, where it is found necessary that she should be repaired. The repairs are effected, and Mr. P., it is stated, advanced the necessary funds for the expenses of such repairs. Assuming this statement to be correct, I doubt whether, under the circumstances of the case, the owners of the vessel could be personally bound by the master for the moneys so advanced; an immediate communication being open to the master with his employers at Newcastle. But be that as it may, it is, I think, perfectly clear that the master could only bind himself \* personally, [ \* 49 ] or the owners of the ship; and the advances in question would not, I apprehend, by the laws of England, give Mr. P. any lien upon the ship itself. What follows? The ship, having been repaired at Cowes, returns to Newcastle; and upon the 17th of May a promissory note is given to Mr. P., dated at Newcastle, and made payable by the master at Rotterdam. I asked, and I have received no satisfactory answer to my question, upon what grounds this promissory note was made payable at Rotterdam? I confess that, in my view of it, this circumstance is full of suspicion; and this suspicion is in no degree cleared away, when I look further to the *res gestæ* of the transaction in question. Mr. P., the original charterer,

sends his own brother-in-law in this vessel to Rotterdam; and, according to his own statement, advances a farther sum of 40*l.* to fit her out for the voyage. Upon her arrival at Rotterdam, a demand is made upon the master for the immediate repayment of the promissory note, and of the 40*l.* 19*s.* The Messrs. Dobree then come forward and advance the money to the master, and a bond is given. This bond is assigned to Mr. P., the original creditor; and upon this bond Mr. P. is now suing in this court, as the promoter of the present proceedings. Looking to these circumstances, I have no doubt in my own mind that the whole scheme was deliberately planned by Mr. P., to obtain repayment of the money he had previously advanced, to the prejudice of the mortgagee; by making the ship liable for that debt to which, by the law of England, it would not be liable. And here I may observe, that the mortgagee of this vessel

has a perfect right to contest in this court the validity of  
[ \* 50 ] such a bond. The law of this country \*not only allows

this, but has given the greatest assistance to mortgagees, in order to render their mortgages valid securities; and it would be impossible for the commercial business of England to go on unless these means were allowed of obtaining money upon the security of vessels. I have no hesitation, then, whether I look to the law, or to the transaction itself as tainted with fraud, to pronounce against the validity of this bond, so far as it relates to the advances which are stated to have been made by Mr. P. himself. And I may further observe that, looking to the affidavits in the cause, every one of them tends strongly to confirm me in my opinion. First, it is sworn that the money was advanced for the purposes of the ship; then that it was lent to protect the ship from being arrested, at the suit of Mr. P., at Rotterdam; and that Miles, the master, was compelled to borrow, and did borrow, the further sum of 50*l.*, in order to enable him to return from Rotterdam to Newcastle. Whereas the palpable truth is, that Mr. P., who was the cause of the vessel going to Rotterdam, was also the cause of the threat of arrest; and he put the promissory note into the hands of the Messrs. Dobree, and authorized them to proceed upon it. I hope the vigilance of this court is not to be surprised by evidence of this description. The Messrs. Dobree, I regret to say, appear to have lent themselves to the transaction in a way not very creditable to them. They swear that they actually and *bonâ fide* advanced the money, for the purpose of paying off the debt due to Mr. P. What do they mean by actually advancing? Why, in plain English, the true course of the transaction was this: — That having received from Mr. P. an inti-

[ \* 51 ] mation \*of the situation in which he was placed, they, by

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The Riby Grove. 2 W. Rob.

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his desire and direction, credited him for the sums which he had originally advanced, upon the understanding that he should obtain the repayment upon the ship itself on her return to England. This part of the case is tainted with fraud from beginning to end.

I now come to the remaining consideration, namely, the 50*l.* alleged to have been advanced by the Messrs. Dobree at Rotterdam, to enable the vessel to return to England. Looking to the form in which this bond has been drawn up, and to the particular circumstances under which it was given, I doubt very much whether, under any state of circumstances, I should be justified in pronouncing for the validity of any portion of a bond of this description. Under the particular circumstances of the present case, I am clearly of opinion that I ought not, and for this reason, namely, that there is no sufficient evidence before the court to establish the necessity for the alleged advancement in question; there is no evidence to show that the money, if requisite for the purposes of the vessel, might not have been obtained from another house at Rotterdam; there is no evidence that any such attempt was made; in short, there is no evidence whatever to clear up the suspicious part of the transaction. It is my conviction that the 50*l.* was pressed upon the master in order to give a colorable appearance to the bond. I am, therefore, perfectly satisfied that the bond cannot be sustained, and I pronounce against it, with costs.

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\* THE RIBY GROVE, Dean.

[ \* 52 ]

February 21, 1843.

**Suit for wages.** Stipulation in the mariner's contract, that a share in the proceeds of a whaling voyage should form a part of the seamen's wages. Defence—that the mariner's claim was founded upon a special contract, over which the court had no jurisdiction,—sustained.<sup>1</sup>

**Señle** — If the special agreement pervades the whole of the contract, the mariner is not entitled to sue in the Admiralty Court. If, however, a part of the voyage is upon an ordinary contract, and the special agreement is only contingent, the court will pronounce for that part of the wages which is claimed under the ordinary contract.

This was a question upon the admission of a summary petition in a suit for subtraction of wages.

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<sup>1</sup> [Such a suit was sustained in *Coffen v. Jenkins*, 3 Story, R. 108; s. c. 2 Notes of Cases, 205.]



The summary petition, consisting of four articles, in substance pleaded:

First. That on or about the 14th of March, 1838, the said ship, Riby Grove, being at the port of Hull, and destined to the Greenland whale fishery on a whaling voyage, J. D., the master, shipped and hired the plaintiff to serve as cook on board said ship during her then intended voyage, and agreed to pay him wages at the rate of two pounds fifteen shillings per month, and one shilling and nine pence for every ton of oil which should be obtained in the said voyage. That said J. D. accordingly entered on board, and into the service of the said ship, and on the 6th of March signed the usual ship's articles or mariners' contract. That on the 8th of March, the said ship sailed from Hull, and proceeded on her voyage to the whale fishery, where she succeeded in taking five thousand three hundred and thirty seals, and seven whales, which produced ninety tons of blubber, and two tons of whalebone; but that on the 9th of June, 1838, the ship got jammed amongst the ice, and although every endeavor was made by the master and crew to extricate her, she became a total wreck, and went down.

That by the arduous and unwearied exertions of the master and part of the crew of the said ship, assisted by the crews of two foreign whalers, The Altona, of Elmshorn, and The Hanover, of [ \* 53 ] Bremen, \* which were on the spot, seventy tons of blubber were rescued from the sinking vessel, thirty tons of which were stowed on board The Altona, and the remaining forty on board The Hanover; in addition to which, various stores, consisting of whaling boats, whaling lines, provisions, and other articles of the value at least of 100*l.*, were taken out of the said ship, and safely deposited on board the said vessels, and deposited in the custody of the owners of the said two vessels to abide the claims of all parties thereto.

The first article then alleged, *inter alia* — That towards the end of July, 1838, the plaintiff arrived in England, and immediately applied to W. T., as the managing owner of the said ship, for the payment of the wages schedule, but that he then refused to make such payment, alleging as his reason for such refusal, that the question as to the title in the property saved as aforesaid was then pending and undetermined between the owners of The Riby Grove and the owners of the said vessels, Altona and Hanover. That at the commencement of the month of August last, the said plaintiff and others of the crew of The Riby Grove, having ascertained that the said W. T., on behalf of himself and the co-owners of the said ship, had received from the owners of the two vessels a very considerable part of the

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said oil, again applied for the payment of the wages, to wit, the 9th of August, but said W. T. on such occasion again refused, at the same time admitting, in the presence and hearing of the plaintiff and of others of the crew, that he and his co-owners had received the value of fifteen tons of oil, amounting, at the lowest value, to the sum of 450*l*. That upon subsequent \* application to the [ \* 54 ] owners of the said two vessels, it was ascertained that the oil taken on board The Altona had produced, at public sale, 14,630 marks, Hamburg currency, namely, 88*l*. sterling; and that one half, namely, the sum of 44*l*., had been delivered over to the owners of The Riby Grove. It was also ascertained that the owners of The Hanover had paid to the owners of the said ship the further sum of 45*l*. That upon such information the plaintiff, in order to compel the payment of his wages, summoned the said W. T. before the magistrates at Hull, but the said magistrates declined to adjudicate upon the question, &c.

Second. That the said oil, and also the other articles saved from The Riby Grove, were the property of the owners of the said ship, and that it has ever been usual and customary for the persons serving on board vessels engaged in the Greenland whale fishery to be allowed a certain sum, varying according to their different capacities, for every ton of oil obtained by their exertions, and that such allowance is expressly set forth in the mariners' contracts, and is universally understood by the masters and crews of such vessels to form part of their wages.

The third and fourth articles are the usual concluding articles.

On behalf of the owners, *Addams* submitted—That the summary petition was inadmissible upon two grounds. In the first place, that the original lien of the mariner was upon the ship, and this lien had been destroyed in the present instance by the misfortune which had befallen the owners in the total loss of their vessel. That although it \* was indeed suggested in [ \* 55 ] the petition that some portion of the ship's stores and apparatus had been saved, it was not attempted to aver in plea that any part of them had come into the possession of the owners. The court, therefore, could take no notice of this circumstance in deciding the admissibility of the plea which was now brought in. That with respect to the seventy tons of blubber, which form part of the cargo, and which was alleged to have been saved, and subsequently sold for the benefit of the owners, it was clear that as against this portion of the property, *quâ cargo*, the mariner's lien for the wages did not extend, and that he had no such claim upon it as would give him the right



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to sue against the owners in this court. That if he had any claim at all against this part of the owners' property, it must be founded upon the special agreement in the ship's articles, that he should receive 1s. 9d. for every ton of oil produced. That under the authority of the case *Jesse v. Roy*, it might indeed be questioned whether he could recover at all upon such agreement, the oil never having arrived in this country; but be this as it may, the cognizance of the claim did not belong to this court, but to other tribunals; and this court had no authority to entertain the question. That there was also a second ground of objection equally, if not still more, fatal to the admission of the summary petition, namely, that upon the face of the petition itself it was evident that the mariners' contract with the owners in this case, was in the nature of a special contract, upon which the court had no jurisdiction to adjudicate. That this principle had been most distinctly laid down by Lord Tenterden in his [ \*56 ] work on Shipping, and had been acted upon in the practice of the court in the case of *The Sydney Cove*,<sup>1</sup> decided by Lord Stowell. That the case of *The Sydney Cove* was strongly analogous to the circumstances of the present case, and the decision of Lord Stowell in that case was binding and conclusive upon the present question. That upon both these grounds the owners were entitled to be dismissed from this suit, and that it was a great hardship upon them that they should have been called upon to appear at all after the great lapse of time that had intervened since the loss of their vessel.

For the mariner, *Phillimore, contra*. That in point of hardship the mariner had most reason to complain in having been thus long deprived of his wages, whilst the owners were in possession of so ample a fund for their discharge. That the decision of Lord Stowell, in the case of *The Sydney Cove*,<sup>1</sup> was grounded upon the express consideration, that the part of the mariners' contract which he rejected was in the nature of a partnership transaction between the mariners and the owners, and that the Court of Admiralty had no power to investigate the question. The case, therefore, of *The Sydney Cove*<sup>1</sup> did not apply in the present case, in which the oil-money constituted a part and parcel of the mariners' wages. That even assuming, for the sake of the argument, that the mariner had no direct legal lien for wages upon the proceeds of the blubber which had been saved, still it was clear in this case that the property had been saved partly by the exertions of the crew of *The Riby Grove*; and

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<sup>1</sup> [2 Dod. 11.]

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they might, therefore, be fairly considered to have a lien upon it in the \* nature of salvage. That this position was [ \* 57 ] borne out by the *dictum* of Lord Stowell in the case of *The Neptune*;<sup>1</sup> that circumstances might present themselves that might induce the court to open itself to the claim of the mariners, of a *persona standi in judicio*, as salvors. The learned counsel referred in detail to the judgment of Lord Stowell, and in conclusion contended that the circumstances of the case fell within the *dictum* thrown out by Lord Stowell, and that the summary petition ought to be admitted.

PER CURIAM.

The *dictum* of Lord Stowell does not apply. The court clearly could not give salvage in a suit for wages. The question which has been raised is an important question, with regard to the jurisdiction of the court. I must take time to consider my decision.

Upon the 2d of March the court delivered its opinion to the following effect.

JUDGMENT — 2d March.

DR. LUSHINGTON. The question to be decided in this case arises upon the admissibility of a summary petition, which has been offered to the court under the following circumstances. The vessel, it appears, being bound on a whaling voyage to the Greenland fishery, the mariner, the plaintiff in the cause, was hired by the master to serve on board in the capacity of cook, at the rate of 2*l.* 15*s.* per month, and 1*s.* 9*d.* upon each ton of oil which might be obtained. Having signed the ship's articles, he proceeded with the \* vessel to the fishery, where, having been occupied in [ \* 58 ] catching seals and whales for a considerable time with success, the ship was eventually lost. It is alleged in the summary petition that, at the time of the loss of the vessel, a certain portion of the ship's stores and of her apparatus was saved; but, as was properly observed by the counsel in the argument, it is not averred that the owners of the vessel ever received any part of the property which is alleged to have been so saved. Under certain circumstances, undoubtedly, in a question of this kind, the saving of a portion of the vessel's stores and her apparatus might form an important ingredient in the judgment of the court; but this consideration cannot apply in the present instance, because the averment to which I have

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<sup>1</sup> Haggard's Admiralty Reports, vol. i. p. 227.

adverted is too loosely pleaded to influence my decision. It is moreover alleged, that a part of the cargo was also saved and carried into Holland, and that a certain sum of money has been paid over to the owners, on account of the cargo so saved, a deduction for salvage being first made. Under these circumstances, I am now asked to admit this summary petition, and the decision of the question, it appears to me, involves two considerations. The first is, whether the wages are legally due or not? And, secondly, whether this court has any jurisdiction to decide upon them? With regard to the first point, I am not aware (and I believe the point never has been decided in this court,) of any case whatever in which it has been decided that, where a part of the cargo has been saved, and the ship has been wholly lost, the mariner can prosecute a suit for wages in this court against the cargo itself. The question was, I [ \* 59 ] \* find, indirectly noticed in the case of *The Lady Durham*, reported in the third volume of Haggard's Reports, p. 196, but no opinion was delivered upon the point by the learned judge who decided that case. The words of Sir John Nicholl, in that case, are these:—"Whether, if any cargo were saved, it could be held to represent the freight, I give no opinion. It might raise a very different question from the present." In the case to which I have adverted, the ship sailed from Liverpool on a trading voyage to Africa, and upon her homeward voyage was totally lost, together with her cargo; the ship and the cargo being the property of the same owners. The case, therefore, of *The Lady Durham* is unquestionably distinguished from the present case in two most important particulars: First, that in the case of *The Lady Durham* the whole of the cargo was entirely lost; and, secondly, the cargo was the sole and entire property of the owners of the ship. The learned judge, Sir J. Nicholl, having given to the question, as it appears, very great consideration, rejected the summary petition of the mariner upon the general principle of law, that a mariner has no lien for his wages upon the cargo; his lien is upon the ship and freight. I entirely concur with Sir J. Nicholl in the doctrine, that against the cargo, *quod cargo*, the seaman can have no claim. At the same time, I think that, as against the cargo, where freight has been earned although not paid, the case might, perhaps, be subject to a different consideration. I do not, however, feel myself called upon to express any immediate opinion upon this point in the present instance; and I should be extremely reluctant to conclude myself upon a [ \* 60 ] point \* which may, possibly, occur hereafter, namely, when the owner of the ship is the owner of the cargo, and the ship is lost but the cargo is saved.

Technically speaking, in such a case no freight would be payable; because there can be no freight payable from a man to himself. Yet the cargo would include in itself the value of the freight. Upon this point, however, I again repeat I do not wish to be considered as pronouncing any decision in the present instance. Further, I do not, at the present moment, feel myself called upon to determine whether the wages are due to the mariner or not. My decision will rest upon the second consideration, to which I will now apply myself, namely, whether this court has any jurisdiction to enforce the payment of the mariner's demand.

Now the question upon this part of the case, as it appears to me, is,— What are the limits which have been prescribed to the jurisdiction of this court? In the investigation of this question, I am not about to enter into a detail of all the preceding authorities, either of this court or the courts of common law. It will be sufficient if, from the more recent authorities, I am enabled to select a sufficient guidance for my judgment, without entering into cases which have been decided in former days, when, perhaps, they could not have received the same decision from any court as they would at the present time. The whole of the law upon this subject is laid in the last edition of Lord Tenterden's book of Shipping, pp. 590, 594. The result of it is shortly this:—“That when the contract is in the usual terms, although it be made in writing and under seal, the Court of Admiralty is entitled to exercise jurisdiction. When, however, the \* contract is special, or, to use the words of the high [ \* 61 ] authority from which I quote them, ‘if the contract be made upon terms and conditions differing from the usual and general rules of law, service alone cannot entitle a seaman to his wages; his right to them must depend upon the performance of the stipulated terms.’” The doctrine thus laid down by Lord Tenterden has reference to a fiction of ancient law, which fiction was this: that the jurisdiction of this court was founded upon the supposition that the contract was made at sea, and the service was there performed; and in our summary petitions it is so alleged that the contract was made at sea. The general result, however, of the passage quoted, and of all the authorities, is, as I have already observed, that if the contract be a special contract, this court is excluded from exercising any jurisdiction over it.

Now, unfortunately, what is and what is not a special contract no one has attempted to define. The principle has been laid down in general terms, that a special contract shall oust the jurisdiction of the Court of Admiralty, but none of the decided cases have defined specifically what is a special contract; and upon this point, conse-

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The Riby Grove. 2 W. Rob.

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quently, I am left entirely to the exercise of my own judgment. In considering the subject, I have referred to the case of *The Sydney Cove*, the only case, that I am aware of, in which a similar question has directly been raised and determined by this court. In that case, reported in the 2d Dodson, p. 11, a summary petition was given in, in the first instance, simply setting forth that the mariner was hired to serve as chief mate on board a vessel, bound on a voyage [ \* 62 ] age to New South Wales, and afterwards on a whaling and sealing voyage, and back to the port of London; and that he was to receive wages at the rate of 8*l.* per month. This was the whole of the case, as set forth in the summary petition; and no objection was taken to the admission of the summary petition in the first instance, and it was admitted as a matter of course. An additional article was subsequently brought in, setting forth the particulars of the whaling and sealing voyage in which the vessel had been engaged, and alleging that the cargo sold for the net sum of 6,442*l.* 10*s.*, and that the mariner shipped and hired himself as chief mate, at and after the rate of a twenty-fourth part, or share of the net produce, of the oil and skins produced thereon. The admission of this additional article was opposed, on the ground that the court had no authority to entertain the cause, and that it could not adjudicate upon a question which was in the nature of a partnership transaction. Lord Stowell directed the case to stand over, that search might be made for precedents; and no precedent being found, he subsequently rejected the admission of the additional article. When the case came again before the court, upon the evidence adduced in support of the summary petition, the objection was again taken, that the proceeding was not a proceeding for ordinary wages, over which the Court of Admiralty had jurisdiction, but for a share in the profits of a whaling voyage, which was not recoverable in a court of this description. Lord Stowell decided in favor of the mariner, but upon this special ground, namely, that there was a considerable degree of obscurity, arising from the manner in which the mariners' contract was drawn up; but he thought the fair construction [ \* 63 ] was, that the mariner was, at all events, entitled to monthly wages during the outward voyage, and that the whaling and sealing voyage was eventual only, being altogether dependent on the inclination of Mr. Underwood, on the arrival of the ship at New South Wales. I have myself examined the ship's articles in the case of *The Sydney Cove*, and I find that there is a special clause contained in them to the following effect. After adopting the common printed form for wages then in use, they go on to say: — " And it is further agreed that, after the delivery of the cargo at Port

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The Riby Grove. 2 W. Rob.

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Jackson, the ship is then to proceed in whaling or sealing, or both, or to take in freight for England, at the option of Mr. Underwood, the owner's agent, as he may think most beneficial for the owner, himself, and the ship's company; and in case the said ship should go a whaling or sealing, or both, then the officers and seamen are to be paid certain shares of the net proceeds of whatever the ship may procure. And if the ship shall be freighted from Port Jackson to London, then the officers and seamen shall be entitled to the wages given at the port of London, at the time of their signing these articles; that the wages due on delivery of the cargo shall be paid them, deducting slops and advances." Now, it is quite clear that Lord Stowell decided this case upon the principle, that the voyage outwards was a voyage on the ordinary mariners' contract. The demand set up in the original act on petition was simply for ordinary wages; and Lord Stowell was perfectly right in taking the distinction which he did take, and in giving the mariner his wages for the outward voyage alone, thereby taking cognizance only of that part of the contract which was in "the ordinary and [ \* 64 ] common form, and rejecting the further demand for a share in the skins and oil-money, upon the principle that he did not possess any jurisdiction to enter into the question.

If the two claims had been so mixed up together as to have rendered them incapable of clear separation, Lord Stowell, I apprehend, would have considered himself bound to have rejected the whole of the demand of the mariner; but finding, as he states in his judgment, that the whaling and sealing voyage was eventual only, and depended upon the inclination of Mr. Underwood, he had, I conceive, a perfect right to pronounce the decision which he gave. I will now advert to the contract in this particular case, for the purpose of considering whether it brings it within any of the principles adverted to by Lord Tenterden, in his book on Shipping, or by Lord Stowell, in his judgment in the case of *The Sydney Cove*.

The learned judge here adverted to the terms of the mariners' contract, as set forth in the act on petition, and proceeded to observe:— "What, then, is the true nature and character of this contract? I must say that, in my opinion, it is, to all intents and purposes, a special contract. Supposing I was to pronounce for the wages, as claimed, and to compel the owners to bring in the 800*l.*, which it is alleged they have received, in what way am I to apportion the shares of the seamen? I must enter into a difficult investigation, and decide upon hand-money in advance, and what is termed striking or fish-money, and the shares which the mariners are to take for oil-money per imperial ton.



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The Alexander Wise. 2 W. Rob.

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What must I do, besides? Why, when the parties [ \* 65 ] become partners under these circumstances, I \* should further have to decide between the interests of the mariners and the owners; for could I possibly determine that the persons on board this ship are to take all that has been saved, in total exclusion of the owners? Are they not partners in one and the same adventure?

Would not the equitable course of proceeding be, that all the parties should come in to share, and receive a division of the property which has been saved, in proportion to the amount to which they may be respectively entitled? This court is utterly incompetent to enter into any such apportionment. I therefore feel bound to reject this summary petition, and I do so upon three grounds:

First, because the contract is a special contract, such as is described by Lord Tenterden as ousting the jurisdiction of this court.<sup>1</sup>

Secondly, because I conceive that I am confirmed by the authority of Lord Stowell in so doing.

And, lastly, because the contract being in the nature of a partnership, I should have, in entertaining the question, to encounter such difficulties as would render it impossible for the court to arrive at a just and equitable result.

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THE ALEXANDER WISE, Coulson.

March 2, 1843.

Case of collision. Defence of a vessel upon the larboard tack, close-hauled, not giving way to a vessel upon the starboard tack and close-hauled; overruled.

THIS was a cause of damage by collision, promoted by the owners of the brig Hylton against this vessel, &c. The court was assisted by Trinity Masters, and the circumstances of the case are fully noticed in the judge's observations to the Trinity Masters.

[ \* 66 ] \* For the owners of The Hylton, *Queen's Advocate* and *Robinson*.

For The Alexander Wise, *Addams* and *Deane*.

PER CURIAM.

Gentlemen — This is a cause of damage by collision, and the

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<sup>1</sup> [The Debrechia, 3 W. Rob. 83.]

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The Alexander Wise. 2 W. Rob.

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issues which you will have to try are the following : — Whether the defendant is solely to blame ; whether the plaintiff is solely to blame ; whether both the parties are to blame ; and, lastly, whether the collision arose from pure and inevitable accident. These are the points to which your attention must be directed ; and, in deciding these points, you may altogether dismiss from your consideration some of the topics which have been urged in the course of the argument which has been addressed to the court. For instance, you have nothing to do with the amount of the damages in question ; that must be referred to the registrar and merchants. If it should happen in any case that it was necessary, for the purpose of ascertaining the cause of the collision, to entertain that question, then it would be a fit and proper point for your consideration ; but where, as in the present instance, it has, in reality, no bearing upon the issues in the case, it is useless to trouble you upon it. Another point, which has been pressed in the argument, is the amount of the bail which has been demanded ; but this again is a matter for the exclusive consideration of the court. And if it should be found, in any cases of this kind, that improper bail has been required, it would be the duty of the court to adopt such measures as it thought fit, to prevent any thing like an attempt at \* extortion. I will now [ \* 67 ] briefly bring to your attention the leading facts of the case, many of which are admitted on both sides, and are, consequently, beyond the possibility of dispute. The state of the wind is not disputed, neither does any question arise with respect to the courses of the two vessels at the time of the collision. The Hylton, it appears, was close-hauled on the starboard tack, her course lying S. E.  $\frac{1}{4}$  S. ; whilst The Alexander Wise was steering W. on the larboard tack, and also close-hauled.

Such being the courses of the vessels, what, according to their own statement, were the measures adopted by the crew of The Alexander Wise ? They state that they put down the helm in the first instance ; and then, in consequence of the hailing from The Hylton, they afterwards put it up. The evidence of the witnesses is in these words : — “ That she was sailing at the rate of about three knots an hour ; that the master had gone down to consult the chart, but, previously to doing so, he had looked out, being anxious on account of the state of the weather, but could not discover a vessel near ; that he had not been below more than a minute when he heard Chase, one of the men looking out on the forecastle, call out that there was a sail ahead ; that Howatt, the mate, knowing that the ship must be close aboard of them, instantly ordered J. N., the man at the wheel, to put the helm down, intending thereby to bring the brig's head to



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The Alexander Wise. 2 W. Rob.

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the wind, and lessen the effect of any collision that might take place; that he had hardly got the word out of his mouth, and J. N. had only just put the helm down, when he heard some one on [ \* 68 ] board the vessel ahead hail The \* Alexander Wise to put her helm up, and he immediately gave the order accordingly, but the collision took place before the brig had time to alter her course, in consequence of the helm having been put down." What, then, is the result of this statement? It is this: That, by their own admission, the persons on board The Alexander Wise departed, in the first instance, from the acknowledged rule of navigation, inasmuch as The Hylton being upon the starboard tack, and The Alexander Wise upon the larboard, it was the duty of the former to keep her course, and the latter to give way. They do not deny the rule, but they allege, in substance, that, from the extreme haziness of the weather, and the close proximity of the two vessels when first seen by each other, it was a proper measure, on their part, to put down the helm, and that if The Hylton had pursued the same course the collision might have been avoided. I must here observe, gentlemen, that with respect to the distance at which the vessels were first descried by each other, and also in regard to the still more important point, the darkness of the night, the respective statements are controverted. On the part of The Hylton it is stated, that the weather, at the time of the collision, was thick with fog and showers, the wind S. S. W., with the moon up. On behalf of the Alexander Wise, the statement is that the weather was extremely thick and foggy, but nothing is said about the moon. Again: it is stated by The Hylton, in the act on petition, that an interval of about three minutes elapsed between the discovery of The Alexander Wise and the collision; and that, during such interval, The Alexander Wise [ \* 69 ] was repeatedly hailed to put her helm \* up, but that no attention was paid to such hailing until The Alexander Wise was close upon The Hylton, and a collision was inevitable. These points, gentlemen, will require your special and particular attention, because the main argument on behalf of The Alexander Wise is, that the collision arose from inevitable accident, on account of the weather, and that blame is imputable to neither party. If you are of opinion that there was sufficient time and opportunity for The Alexander Wise to have put her helm up, and thereby to have bore away, you will, in such case, pronounce her to blame. If, on the contrary, you shall be of opinion that, from the circumstances set forth by The Alexander Wise, the accident was inevitable, and she took the proper course in first putting her helm down, and afterwards putting it up, the owners of that vessel will be entitled to their dismissal.

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The Medora. 2 W. Rob.

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The Trinity Masters were of opinion that it was the duty of the Alexander Wise to put her helm up in the first instance, and that that vessel was solely to blame.

Damage pronounced for, with costs.

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THE MEDORA.

March 10, 1843.

In this case The Medora, whilst on her voyage from Galatz to Hull, struck upon the Hasborough sand upon the 27th of October last, the wind at the time blowing in gales from the W. S. W. A west for assistance was first hoisted, and afterwards the master hoisted the union ensign downwards. This, it was alleged on the part of the owners, was merely a signal for assistance in \* pump- [ \* 70 ] ing, in case of need, or for provisions. A quarantine flag, which was flying when the vessel first struck, had been taken down; and it was admitted that this had been done that the persons coming to her assistance might not perceive the inconvenience to which they might be exposed in going on board the Medora.

The William and Mary fishing lugger, of forty-four tons, and manned with a crew of ten hands, went off to her assistance, and, having been occupied two days in the service, eventually succeeded in getting her off the sands, and carrying her into Yarmouth.

The value of the ship, cargo, and freight was 3,637*l.*, and the action was entered by the salvors in the sum of 800*l.*

The Court awarded 400*l.*

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THE WATT.

March 15, 1843.

Moiety of the ship and cargo awarded in a case of derelict. Deductions from the net value allowed to the owners for necessary expenses in bringing the ship into port, and an apportionment directed by the court.<sup>1</sup>

*Sesbe*: A person merely hiring laborers to assist in the unloading of a stranded vessel, although entitled to some remuneration for his superintendence, will not be entitled to claim as a salvor.

In this case, which was as case of derelict, a question was raised

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<sup>1</sup> [As to the amount of salvage in cases of derelict, see *The Aquila*, 1 C. Rob. 45, note.]

respecting the amount of deductions to be allowed, on account of the owners, from the net value of the ship and cargo. The circumstances of the case, and the nature of the deductions, are fully stated in the judgment of the court.

JUDGMENT.

DR. LUSHINGTON. The principal claimants in this case are Mr. R. Coaker and six other seamen, who boarded the vessel on or about the 18th of September last, when she was abandoned by her own crew, and had four or five feet of water in her hold. By [ \*71 ] great \*gallantry and perseverance, the salvors succeeded in finally bringing her to this country, although, in consequence of the state of the wind and weather, they were not fortunate enough to bring her into port, but were compelled to run her ashore at Eastbourne. At Eastbourne she was taken in charge by a Mr. Wingfield, of that place, who hired a number of men to unload the vessel, and a steamer having been subsequently engaged, by her aid she was eventually taken in safety to Portsmouth.

Looking to the nature and extent of the salvors' services, which lasted from five to six weeks in duration, it cannot be doubted that, but for their exertions and assistance, the property must have been utterly lost to the owners; and the case therefore being, strictly speaking, a case of derelict, the court is, I think, bound to give the salvors a moiety of the property saved, subject to deductions. The real question then is, what these deductions ought to be. Now I will endeavor to state, as clearly as I can, what my decree will be with respect to the expenses which are claimed to be deducted. In the first instance, I am of opinion that the expense of bringing the vessel from Eastbourne to Portsmouth is a fair deduction to be allowed from the net value of the ship and cargo, because, as it has been truly observed, the salvage could not be considered as completed until the vessel was brought to Portsmouth. The first deduction, therefore, will be the sum of 250*l.*, paid for the services of the steamship, and 101*l.* stated to have been expended in the affidavit of Mr. Parsons. In regard to the claim which has been set up by Mr. Wingfield,

(I will not enter into the question whether he was employed [ \*72 ] by Mr. Coaker \*or the agent at Lloyd's, but confine my consideration solely to the nature of the service which he performed,) I do not think that he is entitled to come before the court under the appellation of a salvor. He appears to have done no more than this, namely, to have hired persons from Hastings and Eastbourne, who went on board the vessel as the wind and weather permitted, for the purpose of landing the cargo, and performing services

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The Dowthorpe. 2 W. Rob.

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which cannot properly be denominated salvage services. For any disbursements which he may have *bonâ fide* made for the service of the ship, he is of course entitled to be indemnified; and I shall refer the examination of the disbursements to the registrar of the court. He is also, I think, entitled to some remuneration for his superintendence. The question is, what should be the amount of such remuneration. A tender has been made to him of a guinea per diem, but as this tender may perhaps be considered as rather too small a sum, I shall, in order to prevent litigation, allow one guinea and a half for his personal services. I now come, in the last place, to the claim which has been asserted on behalf of the owners of The Jane Loudon, and I am of opinion that the expenses necessarily incurred by the owners of that vessel, in consequence of the salvage services having been rendered by a part of the crew to The Watt, must be allowed; and these I shall refer to the registrar of the court.

The expenses which I have thus mentioned having been deducted, I shall decree a moiety of the remaining value of the ship and cargo to the owners and crew of The Jane Loudon, to be distributed in the following proportion, namely, to Mr. Coaker and the six seamen, who were the actual salvors, I shall give three fourths [ \*73 ] of such moiety, they bearing their own proctor's expenses; the remaining one fourth I give to the owners of The Jane Loudon and the crew who continued on board that vessel, they also bearing their expenses; and as I consider that in this case the owners of The Jane Loudon have a strong claim in consequence of their vessel having been deprived of so many of her best men, I shall give a moiety of the fourth part decreed to the owners of The Jane Loudon, and the remainder to the persons left on board.

Upon the application of counsel the court further decreed, that Mr. Coaker should receive a double share, and that the owners of The Watt should pay their own proctor's expenses out of their moiety of the property salvaged.

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### THE DOWTHORPE, Lofty.<sup>1</sup>

March 24, 1843.

Question as to the appropriation of the proceeds of a ship and freight in satisfaction of outstanding judgments.

Assignees of a bankrupt shipowner have a *persona standi* to appear for the benefit of the

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<sup>1</sup> [Reported on another hearing, 2 W. Rob. 365; s. c. 2 Notes of Cases, 264.]

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The Dowthorpe. 2 W. Rob.

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general estate, and contest the appropriation of the proceeds, against the assignees of the freight, seeking to make the ship alone liable in the first instance.

Parties taking an assignment of a ship or freight as security for a debt, take such security liable to subsequently accruing liens, namely, bottomry bonds, salvage, wages, &c.

Claim of a bondholder, for the payment of his bond, directed to be satisfied out of the proceeds of the ship and the freight *pro rata*.

Same principle applied to claims under a judgment of the court for pilotage, towage, and mariners' wages.

In this case a suit was brought, in the first instance, against this ship and her freight, for payment of a bond of bottomry.

Other actions were also subsequently entered for pilotage and towage, and for mariners' wages.

The ship was sold under a decree of the court, and the proceeds of the sale thereof, together with the proceeds of the freight, were brought into the registry.

Judgment was suffered to pass by consent in the several actions.

The original ownership in the ship and freight was vested in T. H., a merchant, of Hull, and in Lofty, the former master; forty-  
[ \*74 ] eight sixty-fourth \* parts or shares belonging to T. H., and the remaining sixteen shares to the master.

Antecedent to the commencement of the proceedings in this court, T. H. had become a bankrupt, and, prior to his bankruptcy, he had assigned his interest in the forty-eight shares of the ship to Pease, a broker, of Hull, as security for money advanced. He had also assigned his interest in the freight, subject to certain conditions, to Burney and others, under a deed of assignment.

Application was now made on behalf of the bondholder for payment of his bond out of the proceeds of the ship and freight, and appearances were given for the assignees of the freight under the deed of assignment, and for the assignees under the bankruptcy of T. H., praying to be heard in objection. No objection was made by Pease, and no appearance was given for Lofty, the master.

The question which was raised regarded the appropriation of the funds in the hands of the court, in satisfaction of the different judgments which had been obtained.

The question was argued by

*Haggard and Harding*, for the assignees of the freight.

*Addams and Bayford*, for the assignees of the bankrupt.

*White*, for the bondholder.

The details of the case and the nature of the objections are fully noticed and elaborately discussed in the judgment of the court.

## \* JUDGMENT.

[ \*75 ]

DR. LUSHINGTON. In this case a bottomry bond was granted at Singapore upon this ship and her freight, upon a voyage from that port to the port of London. The bond was pronounced for in this court, without opposition, and the present question arises upon the appropriation of the several funds which are in the possession of the court, in satisfaction of the various demands which have been set up against them.

The funds in question consist; first, of the proceeds of the ship, which has been sold by order of the court, amounting to the sum of 2,621*l.* 9*s.* 8*d.* Secondly, of the freight, which has been brought into the registry, amounting to the sum of 767*l.* 10*s.* 11*d.* Thirdly, that portion of the freight for which bail has been given, amounting to 311*l.* 16*s.* 2*d.* The whole amount of the funds in question being 3,700*l.* 16*s.* 9*d.*

Against these funds the following claims have been asserted. First, the bondholder's claim upon the bottomry bond amounting to the sum of 1,757*l.* 10*s.* 2*d.*; secondly, the demands for pilotage, towage, and wages, amounting to 491*l.* 5*s.* 5*d.*; in the whole 2,248*l.* 15*s.* 7*d.* Besides these, there will also be the amount of the proctors' bills for costs when taxed. It is clear, therefore, that the proceeds of the ship alone exceed the whole amount of these several demands. It may possibly be necessary hereafter to consider whether, as regards the funds for payment, there is any distinction between a bottomry bond and the other demands; but I shall postpone the consideration of such questions until I have brought under examination the claims against the ship and freight, or the proceeds thereof, which, in a legal view, are one and the same \*thing; remembering [ \*76 ] that I have to determine, in the first place, against what funds these demands shall be placed, and not to whom any residue may be ultimately paid out. With regard to the ship, then, it appears that she was built at Stockton, in 1837; that some time in August, 1841, T. Humphreys, the elder, was the owner of forty-eight parts or shares, and Lofty, the master, was the owner of the remaining sixteen shares; that T. Humphreys and his son carried on business under the firm of T. Humphreys, the elder, and T. Humphreys, the younger; but that these forty-eight shares in the vessel were not the property of the partnership, or of any other firm in which Humphreys, the elder, was engaged, but were a part of his own private estate. That the firm of Humphreys & Son had an account with Pease & Co., bankers, at Hull, who had made advances to them, and as a security for these advances, and also for further advances that might be made to the firm of himself and son, and to himself indivi-



dually, or to other firms in which he was engaged, these forty-eight shares were assigned by Humphreys, the elder, to Pease & Co. Thus matters remained, save, probably, with some variation as to the amount of the debt, until June, 1842, when Humphreys & Son became bankrupts. At this time there was due to Pease & Co. the sum of 14,480*l.* Messrs. M., W., & S., were appointed the assignees of Humphreys & Son, and they are the parties now appearing in court, and seeking to prevent the proceeds of the ship from being made the sole and primary fund for the liquidation of all these demands. No appearance has been given for Pease & Co.,

[ \*77 ] and some doubts have been suggested in the argument as to the right of the assignees to appear and make the prayer

which they have made. The first question then is, as to the right of the assignees of Humphreys & Son to appear in these proceedings. Now an interest to establish a *persona standi in judicio* is not an absolute right to a given sum of money; but if a person may be injured by a decree in a suit, he has a right to be heard as against the decree; although it may eventually turn out that he can derive no pecuniary benefit from the result of the suit itself. I am clearly of opinion, therefore, that under the circumstances of the case, the assignees of Humphreys, the elder, and son, have a sufficient *locus standi* to entitle them to appear and protect the portion of the fund which regards the forty-eight shares of the ship which originally belonged to Humphreys, senior. Nor does it at all follow, because Pease & Co. may have an interest, and do not appear in the cause, that, therefore, the assignees of Humphreys & Son have not an interest also. That the assignees are so entitled to appear, is, I conceive, most amply borne out by the following considerations. In the first place, they have the legal interest, and are entitled to the equity of redemption in these forty-eight shares, or the surplus, after payment of the debt; and it is no answer to say there will be no surplus, for that is a fact only to be ascertained by the final result. Secondly, Pease & Co. have proved their debt against the joint estate of Humphreys & Son, claiming to avail themselves of the security from Humphreys, senior, in liquidation of any balance that may remain due upon their debt,

after receiving the dividends upon the joint estate of the [ \*78 ] bankrupts, which they are unquestionably entitled to do,

the security being on the separate estate of one of the partners. Now, if the dividend upon the joint estate, and the produce of the security, should be more than sufficient to liquidate the debt of Pease & Co., the assignees will be entitled to the surplus of such security. They have, therefore, a beneficial interest in protecting the proceeds of the ship. It may also be further noticed, that the

assignees would equally have had an interest, although somewhat different in its kind, if the forty-eight shares had belonged to Humphreys & Son, and not to Humphrey, senior, alone; for in that case, although Pease & Co. must have realized the security before they could have proved against the general and joint estate of the bankrupts, yet the greater the amount which the security produced, the less would have been the amount to be proved against the joint estate.

The question which I have thus far been called upon to determine, is of easy solution; but those which remain behind are not so easily disposed of. The next point to be determined is this: What was the nature and extent of the right vested in Pease & Co. by the assignment of the forty-eight shares in this vessel? As against Humphreys, the elder, they had a clear right, so long as he remained solvent, to retain, or, if necessary, to sell the security for the liquidation of their debt, and that free from any demand afterwards accruing against the vessel. The ship, it is true, as to third parties, might be primarily liable, but if Humphreys, senior, had continued solvent, he must have made good to Pease & Co. any demand against the ship, though in another shape; for he \*must [ \*79 ] have paid from his own funds any deficiency in the subsequent value of the security which might be caused by those after-accruing demands. For instance, with respect to the bond of bottomry in this suit, if Humphreys, senior, had never become bankrupt, the proportionate amount of the bond would have been to be deducted from the forty-eight shares, and Pease & Co. would have held these shares, minus the extent of the proportionate amount of the bond; but Humphreys, senior, would have been bound to make good the deficiency, until his debt with Pease & Co. was extinguished. Upon this point no question could have arisen, if Humphreys, senior, had continued solvent; but his bankruptcy creates a difficulty.

It cannot for a single moment be denied, that a ship, in whosoever hands she may be, or whoever has an interest in her, is liable to liens subsequently accruing, such, for example, as salvage, bottomry bonds, and seamen's wages. These are liens upon a ship, in the strictest sense of the term; and those persons who take a vessel as a security, must take it subject to the incumbrances which the law may impose upon it for the benefit of third parties. It is not, indeed, disputed, in the present instance, that the ship which forms the subject of discussion in this case must bear its share of these liens, except, perhaps, under the peculiar circumstances of the case, in the one instance of the seamen's wages; the question is, whether the burden shall be spread proportionably over the ship and freight. I would here observe, that the preceding observations apply exclusively



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The Dowthorpe. 2 W. Rob.

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to the forty-eight shares of the vessel mortgaged to Pease & Co.; the remaining sixteen shares, so far as it appears, belong to [ \* 80 ] Lofty, the \*master. No appearance has been given on his behalf; but the process of the court has been served upon the ship itself, and consequently he must be held to be legally cognizant of these proceedings. At the same time, the court is bound to protect his interest as much as if he were himself present, or represented by counsel and proctor to protect him. Having made these observations with regard to the ship, I will now advert, in the next place, to the freight. With respect to the freight, it is claimed by virtue of an assignment, dated the 12th of May, 1842; and for the sake of simplifying the case, which, in many respects, is very complicated, I will, in the first instance, assume that the whole freight is duly assigned to the assignees named in the deed, for debts incurred on account of the ship. In the course of the argument, reference was made to the case of *The Percy*,<sup>1</sup> to which case I will presently advert; and remarks were made upon the difficulty which Sir J. Nicholl felt in allowing a mortgagee of a ship to intervene (in a case where a bondholder was proceeding against the ship only, and not against the freight also.) This difficulty has not been insisted on in the present case, and very properly so; for seeing that the statute, 3 & 4 Vict. c. 65, s. 32, has relieved the court from all obstacles which formerly existed as to the titles of mortgagees in respect to the ship, I cannot but think that the same statute, which enables this court to adjudicate upon the claims of mortgagees against ships, virtually confers upon the court the same power over the freights, or the funds in court representing the freights, otherwise it would [ \* 81 ] be \*impossible for the court to determine a question of mortgage upon the net proceeds of the ship itself. Assuming, then, the whole of the freight in this case to be duly assigned to the assignees named in the deed, is such freight to be exempted from all liability to the payment of this bond, at least until the whole of the proceeds of the ship have been exhausted? If so, on what principle is the ship to be considered as the exclusive fund? What is the first and great principle which ought to regulate all liability to pay? I conceive that such liability must, in equity, be governed by the principle, that he who takes a benefit should bear his share of the burden. In the majority of bottomry transactions, where the ownership of the freight and of the ship are ordinarily vested in the same person, no question can arise; but where these interests are severed,

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<sup>1</sup> Haggard's Admiralty Reports, vol. 3, p. 402.

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the principle becomes applicable. Both the ship and the freight are benefited by a bottomry transaction; and it is essential to a legal bottomry bond that it should be so. Why, then, because the freight is assigned to one person, and the interest in the ship belongs to another, is the burden to be borne by the ship alone? Equity and justice, it appears to me, forbid any such conclusion. Having thus far considered the question upon principle, I will now refer to the authority of decided cases, and see whether they are opposed to the principle which justice calls upon me to apply in the present instance. The case cited in the argument was the case of *The Percy*; and the decision in that case seems to me to have been entirely founded upon the ground that the applicant was a mortgagee. True it is, that general words were used by Sir \*John Nicholl in delivering his judgment, without qualification, but still I think that, in fairness, the decision of Sir J. Nicholl cannot be considered to extend beyond the circumstances of the case; and the case did not require him to decide what should be done where the ownership of the ship and freight were vested in different persons. In that case a monition was applied for, to bring in the freight at the instance of the mortgagees of the ship, the ship having been sold, in a cause of bottomry; but the court refused the application. Caveats were then entered, on the part of the mortgagees, against the payment of the proceeds of the ship to the bondholder. Sir J. Nicholl was of opinion that a mortgagee of a ship had not such an interest as would entitle him to appear in this court. Now, I greatly doubt whether the principle, which governed the proceedings of this court at the time when this decision was made, were not carried too far in the judgment of Sir J. Nicholl.<sup>1</sup> A mortgagee, undoubtedly, at that time, could not initiate proceedings in the Court of Admiralty; but it is quite a different question, whether he could not intervene to protect his interest when a suit was already instituted by parties competent to do so. Sir J. Nicholl said, "There is sufficient to discharge this bond out of the proceeds of the ship. The freight, it is true, is part of the bondholder's security, but he is not compellable to enforce it. I am not aware that this court has ever taken up questions of this kind, as between mortgagees and owners; if it is bound to enter into them, the mortgagee should obtain an injunction to bar the payment of the existing proceeds to the bondholder; but, unless the court is so stopped, I adhere to the \*opinion that he is [ \* 83 ] entitled to have his bond and interest paid out of the sale of

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<sup>1</sup> [See *The Fortitude*, 2 W. Rob. 221.]

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the ship, and that a mortgagee has no right to impede the payment." Now the evident consequence of that judgment, if carried to its full extent, would result in this; that supposing the law of this court, with respect to mortgages, had remained unaltered, in no case could the mortgagee of a ship (and mortgagees of ships are of every day occurrence) appear in a suit to protect his interest. The question is now set at rest by the late act of parliament; but I am inclined to think that although previous to the passing of the act 3 & 4 Vict. a mortgagee could not have initiated a suit in this court, yet he might have intervened for the protection of his interest.

I will now refer to another case, which establishes a different doctrine, and it is most probable that at the time Sir J. Nicholl decided the case of *The Percy*, he was not apprised of a former decision of Lord Stowell. I think, therefore, that the case of *The Percy* is not to be considered as a conclusive authority against the application of the equitable principle which I am now discussing.

The case to which I am about to refer, was decided by Lord Stowell in the year 1821, and, to the best of my belief, it has never been reported; but I was myself counsel in the case, and I have referred to my own notes, and to the original papers in the cause. The case in question was the case of *The Prince Regent*; and it appears to me to sustain completely the principle which I consider applicable to the present case, and it, moreover, decided some very important questions.

[ \* 84 ] In that case, the bond was upon the ship and \* cargo only, not mentioning the freight. The ship and cargo were arrested, and the freight was paid over to other parties, before the suit commenced, at the instance of the bondholder. The ship proved insufficient for the discharge of the bond, but the cargo was ample for that purpose. In May, 1821, Lord Stowell decreed that the bondholder should be paid the balance of the proceeds of the ship, wages deducted, and should be put in possession of the cargo, so far as was necessary for the full payment of the bond. The owner of the cargo prayed a monition against the owner of the freight. Now mark the extent to which Lord Stowell altered his decision. The owner of the cargo, that is, the owner of part of the property under hypothecation, prayed a monition against the owners of a part of the property not specifically made liable by the bond; an act on petition was brought in, and the owners of the freight rested their defence upon the ground that the freight was not bound, not being named in the bond, and that it had not been arrested at the suit of the bondholder, as he had not proceeded against the freight, but against the ship alone. Lord Stowell required the freight to be brought in, and sub-

sequently he pronounced it to be subject to contribution in discharge of the bond. The decree is to this effect, as I find it indorsed upon my brief: "The court pronounced for the bond, with interest and costs, and directed the freight to be brought in and to be made subject to average." Before I proceed to notice the ultimate result of this case, I will here state how importantly it bears upon the question I am now considering. In the first place, it shows that where a bondholder has directly, or by intendment, a lien \* on [ \* 85 ] the freight and cargo, and the property in these is vested in different owners, the owners of the one may have the aid of this court to bring the other into contribution, without the bondholder's movement or concurrence; secondly, it establishes the power of this court to apportion the liability between the two. Now, in the case of *The Prince Regent*, a subsequent question was mooted, and in June, 1842, Lord Stowell further decided that the freight and ship must be exhausted before recourse could be had to the cargo; but, in making that decision, he made no departure from his former judgment in respect to the ship and freight. Upon the principle of justice, therefore, and the authority of Lord Stowell, I am of opinion, that in all ordinary cases, (there may be exceptions under particular circumstances,) where the ship and freight belong to different persons, the demand of a bottomry bondholder should be paid by both, *pro rata*; and this rule I shall apply, as far as I am enabled, to the present case.

With regard to the demands for pilotage and wages, I see no reason why the same principle should not apply in the present instance; at the same time, I must be understood as not expressing an opinion that it will do so in all cases. The exertions of the pilot and seamen contribute equally to the preservation of the ship and freight. Cases may arise in which the freight may have been paid beforehand, and if so, that circumstance might create a difference. There may also be other cases of exception, and it is to prevent misunderstanding hereafter that I am desirous expressly to guard myself from being supposed to say that the rule will apply in all cases.

\* I have hitherto considered the question, upon the assump- [ \* 86 ] tion that the whole of the freight belongs to the assignees named in the deed of the 12th of May, 1842, but, unfortunately, that is not the case before the court; and hence have arisen the real difficulties which I have had to encounter in the case. The apprehension of these difficulties, I confess, almost disposed me, in the first instance, to apply the principle generally, without regard to the peculiar circumstances of this case, arising from the deed of May, 1842; but I considered, upon reflection, that in so doing I should only have postponed

the evil day, and that the same difficulty would have arisen hereafter, in a more complicated shape, when the balance of the funds in court should be demanded; or that I must have retained the funds till a suit in equity had been commenced, and judgment been delivered upon them. Considering it to be my duty, if possible, to ward off from the parties interested this serious consequence, I will now more exclusively address myself to the deed of 1842, recollecting that the freight would be divisible amongst the owners, according to their shares in the vessel, and that Humphreys, senior, was entitled to forty-eight shares, and Lofty, the master, to the remaining sixteen shares.

The deed in question purports to assign the whole of the freight; but the parties to it, besides the assignees, are only Humphreys, the elder, and Nichol, the broker. It has not, and I think could not be contended, that Humphreys, the elder, could assign more than his own forty-eight shares. It has, however, been urged, that Nichol, the

broker, was the ship's broker, and, as such, was legally  
[ \* 87 ] authorized to pledge the whole freight. For such a \* position, I know of no authority. Surely it does not follow that a broker, because he is employed to obtain a charter-party for a vessel, can assign the freight to other persons, without the consent of those to whom it legally belongs. Such a doctrine is, to me, wholly new, and, if admissible, would be evidently inconsistent with the protection of the interests of British ship-owners.

If I was told that this was a mercantile custom, I might have hesitated in expressing an opinion; but, as it is, I cannot reconcile, consistently with the interest of ship-owners, the doctrine that a ship's broker can assign the freight of a part owner, without his direct authority and concurrence. It has been said, that the deed may be supported against Lofty, the master, and part-owner in the present instance, because the assignment was made for the protection of Nichol, who was a creditor against all the owners of the vessel for money advanced for the service of the ship. Assume that he was a creditor, as suggested. Would that circumstance entitle him to assign, for his own protection, the property of one of his debtors, without his consent? Can a personal creditor assign the property, be it freight or any thing else, of his debtor, without his consent? I never heard of such a proposition, and cannot believe it to be correctly founded. The very terms of the indenture before the court incline me to believe, that the parties to the assignment were themselves cognizant that the whole of the freight was not legally assigned by the deed, for at the conclusion of it I find a provision and a covenant in the following words: "That for the considerations therein

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mentioned, they, the said T. H. and J. N. did bargain, sell, assign, transfer, \*and make over unto the said William [ \* 88 ] Burnee and Co., all the freight and earnings of the said ship, and all benefit of lien upon the cargo, and the benefit of all policies of insurance, in which the said T. H. and J. N. were interested, upon trust," &c.

It has been suggested that this is a mere ordinary clause. Be it so ; but, independent of the clause, I see no reason to conclude that Lofty was bound by the deed itself.

For the reasons, then, to which I have adverted, I think that Lofty's share in the freight was not duly assigned by the deed. If this be so, what did pass to the assignees under the deed of 1842 ? The forty-eight shares of the freight belonging to Humphreys, the elder, and these to be applied according to the covenants of the deed. And hereupon another question arises with regard to the payment of wages out of the freight. The assignees under the deed take expressly on the condition of paying the wages, after defraying the expense of the deed. I have been asked to disregard this provision of the deed ; but I cannot discover upon what reason I am to do so. How does the case stand ? The original title to the forty-eight shares of the freight was in Humphreys, the elder. All that remains of that right, not parted with in the deed, is in the assignees under the bankruptcy of Humphreys and Son ; for the assignees under the deed can have no further right as against the assignees under the fiat than they could have had as against Humphreys, the elder, himself ; if he might have required a specific performance of the stipulations of the deed, so may the bankruptcy assignees, for they now represent him. If Humphreys, senior, had not become a bankrupt, he \* might undoubtedly have required that the freight, after [ \* 89 ] payment of the expenses of the deed, should be applied, in the first instance, to a liquidation of the wages. The same right of enforcing the conditions of the deed is now vested in the assignees under the bankruptcy ; and I do not see in what way the original condition of the assignees under the deed is prejudiced by this. They took the freight subject to a condition, namely, the payment of the wages, and also of all liens which the law might subsequently impose upon the vessel ; they will now receive their proportion of the freight, deducting their proportion of the wages, a condition annexed to their title, and of the bond and wages, which are liens imposed by law.

I will now endeavor to state, as intelligibly as the complicated circumstances of the case will permit, the mode in which I propose to deal with the various funds which are in the possession of the



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court. The amount of the bond, together with the pilotage and wages, must be paid proportionably out of the whole proceeds of the ship and freight. The wages, so far as Humphreys, the elder, may be liable, must be borne, in substance, by the forty-eight shares of the freight, so as to indemnify the general estate of Humphreys, senior, from any liability on that account. Lofty, the master, not being a party to the deed, is not entitled to be benefited by it. The wages, therefore, must be paid, in the first instance, out of the general proceeds of the ship and freight, proportionably; and the forty-eight shares in the hands of the assignees under the deed, must indemnify the assignees under the bankruptcy, as to [ \* 90 ] his proportion of the wages. Lofty must \*bear his proportion, as the owner of sixteen shares in the ship and freight.

It may now be convenient to state, not as delivering a final judgment on the point, but for the purpose of affording information which may prevent future litigation, what will probably be the ultimate disposition of the funds. The residue of the forty-eight shares of the ship will belong to Pease & Co., unless, upon further information, the court shall be enabled to pay them to the assignees, under the fiat of bankruptcy. The remaining sixteen shares of the ship will belong to Lofty; or, if he is become a bankrupt, as suggested by the counsel in arguing the case, to his assignees. The residue of the forty-eight shares in the freight will be payable to the assignees, under the deed of 1842; the residue of the remaining sixteen shares to Lofty, or, as the case may be, to his assignees. This, I apprehend, will be the ultimate working out of the principle which the court thinks applicable to this case. From the difficult and complicated chain of circumstances which I have had to unravel, in forming my decision, it is possible that I may have erred in some of the details, or may not have expressed myself with sufficient clearness. I shall, therefore, direct this decree not to be entered for one week, in order to give all parties interested the opportunity to consider it. If any party thinks the decree unjustly prejudicial to his interest, and shall signify the same in the registry, I will appoint a day to hear his objections; but I wish it to be distinctly understood, that no objection to the general principle upon which the [ \* 91 ] liens upon the ship \*and freight have been apportioned, will be open to discussion. The objections must be confined strictly to the application of those principles to the peculiar circumstances of this case.

It would have been a great relief to my mind if I could have confined my judgment to the simple declaration, that the bond and other liens should be paid out of the proceeds of the ship and freight pro-



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The Ocean. 2 W. Rob.

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portionably ; but I could not avoid seeing that the result of such a decision would have been, that I should have relieved myself at the expense of the parties in the suit. Its effect must have been, either that the proceeds of the ship and freight must have remained in the registry, to await a decision in a suit in equity, or all these questions must have been agitated upon motion to pay out the balance of the proceeds. I do not wish to forestall any questions of the kind which can arise. In forming my opinion, I have, to the best of my ability, considered all the points upon which I have pronounced my decision ; and if the parties are dissatisfied with it, they have still open to them every remedy which they possess.

The costs of the bondholder must be paid out of the proceeds of the ship and freight ; as to the other parties, I give no costs.

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THE OCEAN, Martin.

April 19, 1843.

The carrying an order for a steamer to go out of harbor, to a vessel which was in danger and distress, held to be a salvage service, under the circumstances of the case.

THIS was a question of salvage, under the circumstances noticed in the judgment of the court.

For the salvors, *Harding*.

For the owners, *Addams*.

\* PER CURIAM.

[ \* 92 ]

A tender of 10*l*. has been offered by the owners of The Ocean, for services which are admitted to have been rendered by the salvors in the present instance ; and the question which I have to determine is, whether, under the circumstances of the case, such tender is a sufficient compensation. The facts of the case are shortly these :— On the morning of the 15th of November, the salvors, consisting of five men, including the master, had been occupied in the North Sea in fishing, but, in consequence of the state of the weather, they were compelled to give up their employment, and were making for the shore, when they observed the brig, The Ocean, apparently without canvass and in distress. It is expressly averred, on

behalf of the salvors, that, at the time when they were so making for the shore, they were on the look-out to render assistance to any vessel which might happen to be in a state of distress; and I must say that this averment is highly probable, because, in the first place, the period of the year in which the transaction took place appears to render it likely; and it is a matter of notoriety, that fishing vessels off the coast are alternately, almost universally, employed in the performance of salvage services. Observing The Ocean apparently in distress, the salvors immediately altered the course of their vessel, and proceeded to her assistance. There is some discrepancy in the statements, as to what passed when the vessels neared each other. On behalf of The Ocean, it is stated that a verbal communication was made to the fishing smack by the master of The Ocean; but, on behalf of the salvors, it is alleged that the effect of that [ \* 93 ] communication could \*not be understood by the persons on board the fishing smack, in consequence of the noise made by the sea and wind. I am inclined to think that the statement of the salvors is the correct statement, and for this reason, namely, that they proceeded to board The Ocean; and it is admitted by the master of The Ocean, in his affidavit, that the boarding of the vessel was not unattended with risk and danger. He says that the degree of danger has been exaggerated by the salvors, but he admits that there was risk and peril in the attempt; and it is not very probable that, if the smack's men had heard the communication, and there had been no necessity whatever for their encountering this danger, they would voluntarily and unnecessarily have exposed themselves to it. With respect to what took place when the salvors got on board, the respective statements are again most conflicting. The master of The Ocean swears most distinctly that he informed the salvors that his vessel was not in any danger, and that he only wished to have her removed from the situation in which she then was. This statement is directly denied on the other side; and, looking to the probabilities of the case, I must say that the balance of credibility again strongly inclines in favor of the salvors. What is the obvious meaning of the latter part of the master of The Ocean's statement, that he only wished to have his vessel removed from the place in which she then was? Does it not convey an evident intimation on his part, that although he might not, perhaps, have considered his vessel in a situation of immediate danger, yet he did not regard the position in which she was then placed as a safe one. This is the construction which I am disposed to put upon it; and I am [ \* 94 ] confirmed in my opinion \*by the order in writing which was subsequently given, for a steamer to come out to his assist-

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The Ocean. 2 W. Rob.

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ance. It is stated, indeed, by the master of The Ocean, that when he delivered the orders in writing into the hands of the salvors, it was accompanied by a verbal communication, that he should not require the assistance of the steamer in case she did not come out immediately, and in case the weather should moderate.

It is unfortunate, I think, that the written order did not embody this intimation, because it would have cleared up a great deal of doubt and uncertainty in this case. Before I more immediately advert to the written order itself, I will here briefly notice the account which the master of The Ocean gives, in his deposition, of the circumstances under which it was written. He says, in his affidavit, in these words: — “That he, the deponent, acting under the advice of the pilot, was apprehensive, in case of the gale increasing, that the brig might not be able to ride it out in her before-mentioned position;” and he then goes on to state “that he gave the aforesaid order to the said smack’s men to send out a steamer forthwith, with the express verbal directions as aforesaid, — that the same would not be required unless she arrived before or during the said night.” It is here to be observed, that although, according to this statement, it was at the suggestion and advice of the pilot that the master of The Ocean was apprehensive that the brig was in danger, and that the order was written, yet the pilot himself makes no affidavit on the present occasion, either on the one side or on the other. The court has, I think, reason to complain that it has thus been left, in the present instance, without the judgment of that individual,

\* upon whom, in a matter of this description, it would have [ \* 95 ] been induced to place considerable reliance. I will now refer to the written order in question, which has been brought in as an exhibit in the cause. It is dated 14th of November, 1841, and is in these words: — “Sir, — Please to send, as soon as possible, a steamboat to tow me up to London, the vessel being disabled and in danger, and I cannot work her.” It is addressed to the Steam Towing Company, or any other; and at the conclusion of it is written: “Let the bearer come with the steamer.”

Now looking to the terms in which this order is drawn up, it is impossible for a single moment to doubt, upon the face of the document itself, what were the real motives which induced the writer to give the order in question to procure the assistance of a steamer. It is, I am bound to hold, a statement in plain and intelligible terms, not to be misunderstood, that either in the apprehension of the writer, or of the pilot who had the charge of the vessel, supposing it to have been written at his suggestion, the vessel had been disabled, in consequence of the wind and weather to which she had been

exposed; that she was in a state of danger, and that they were unable to extricate her without the assistance which was craved through the medium of this letter. With respect to the qualification, even assuming it to be true that the master of The Ocean did accompany it with a verbal direction that the steamer would not be required unless she arrived before or during the night, it was evidently a qualification extremely difficult to be acted upon, because the precise time when the steamer could get out of Ramsgate Harbor, or the [ \*96 ] \*exact period at which she might be able to reach The Ocean, must have been matter of great uncertainty under the circumstances of the case.

The remaining facts of the case may be summed up in a few words. The salvors conveyed the order to Ramsgate, and a steamer went out to the assistance of The Ocean, accompanied by the master of the fishing smack, and on the following morning her services were accepted, and she towed the vessel proceeded against, in safety, up to the port of London. It may here also be noticed, as a circumstance not altogether without its bearing upon the question at issue, that the rate at which the steamer was paid was not that of ordinary towage payment. This is not an unimportant circumstance, as showing that the vessel at that time was in such a state and condition that more than the ordinary rate of towage could be justifiably demanded by the owners of the steam vessel, and was paid by the owners of The Ocean.

With regard to the absence of the protest, I place no reliance upon it in the present instance; because this is not a case in which great damage was done to the vessel, or in which it was particularly necessary to make a protest, for the purpose of making good a claim upon the underwriters. The value of the ship, cargo, and freight, is 10,500*l.*, and although I do not think that the value can be said to form an important ingredient for consideration, under the circumstances of the case, yet I do not think it is altogether to be left out of my estimate. I think that the salvors are entitled to be remunerated:

1st. For their readiness, during stormy weather, to render assistance to ships in distress.

[ \*97 ] \*2dly. For the peril which they encountered in boarding this vessel.

3dly. For the actual service rendered in conveying the message to the port of Ramsgate, and in the master returning as he did with the steamer, and accompanying the vessel to London. It is desirable that the salvors should be well paid for their services, and I shall overrule the tender, and decree them the sum of 40*l.*, for the general encouragement of similar efforts.

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The Florida. 2 W. Rob.

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## THE FLORIDA, Provença.

April 28, 1843.

An attachment for contempt of court decreed against a brig of war's agent, residing in the Island of Grenada, for non-payment into the mixed Commission Court, Sierra Leone, of the proceeds of a slave capture, as directed by a monition from the Court of Admiralty.

IN this case, the Portuguese schooner, The Florida, was seized and taken, with a cargo of 283 slaves on board, by her Majesty's brig of war Harpy, and carried to the Island of Grenada, where, in consequence of the vessel being unseaworthy, the slaves were landed and delivered over to the collector and controller of her Majesty's customs at that island. The vessel was sold, and the proceeds of the sale, amounting to 318*l.* 6*s.*, were paid to P. G., the agent appointed to act for the captors at that island.

Proceedings were subsequently instituted by the captors in the mixed Commission Court, at Sierra Leone, and on the 21st of November, 1839, the schooner, her tackle, &c., were condemned to the captors. Applications were subsequently made to P. G., to remit the proceeds of the sale of the vessel to this country for the purpose of distribution, but without effect.

\* Upon the 9th of July, 1841, a monition was decreed [ \*98 ] to issue against J. P., for payment of the proceeds into the registry of the mixed Commission Court, within sixty days after service thereof. The monition was returned duly executed, and an affidavit was brought in sworn by the registrar of the mixed Commission Court, stating that he had examined the records of the mixed Commission Court, since the date of the decree of condemnation, to the 27th of February, 1843, and that neither the said sum of 318*l.* 6*s.*, nor any part thereof, had up to that time been paid into the registry of that court.

Under these circumstances, the court was now moved to decree an attachment for contempt of court to issue against the said P. G.

Attachment decreed.

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The Anne and Jane. 2 W. Rob.

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THE ANNE AND JANE, Boyce.<sup>1</sup>

April 28, 1843.

Question of practice as to pleading.

Objections to the admission of a reply in a cause of damage, upon the ground of redundancy and irrelevancy, overruled.

*Semble*, where the parties suing are foreigners, the court will be more indulgent in overlooking mere technical defects in the conduct of the proceedings than in the case of a British suitor.

Case heard upon its merits before Trinity Masters, and damage pronounced for.

IN this case, which was a case of damage by collision, an act on petition and an answer had been admitted in the cause. A reply was now brought in, and the admission of this reply was opposed.

In support of the objection,

*Addams* and *Robinson* submitted — That it was incumbent upon the party proceeding in a cause to state his case in the first instance, and it was not competent to him to lie by and plead, in subsequent pleas, facts that must have been within his knowledge when [ \* 99 ] the original plea was given in. That \*some portion of the plea now offered was open to objection upon this ground.

That other parts of the plea were a mere repetition of matters pleaded in the original act; and lastly, that the reason assigned, in the conclusion of the reply, for the delay which had intervened in the institution of the proceedings, was no excuse at all, inasmuch that the owners of *The Jeune Flavie*, though foreigners, by resorting, in the first instance, to the assistance and advice of practitioners of the court, might have been informed, at a much earlier period, of the legal mode of obtaining their redress.

*Phillimore* and *Harding*, *contra* — That as regarded the practice of the court, the objections which had been taken were somewhat unusual and irregular, and were calculated to produce great inconvenience, by causing an increase of delay and expense to the suitors. That the statement in the conclusion of the reply was a sufficient justification of the delay which had taken place in commencing the proceedings. That although some of the averments might possibly have been set forth more conveniently in the original act on petition, in deciding their admissibility, the court must consider them in con-

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<sup>1</sup> [S. C. 2 Notes of Cases, 313.]



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The Anne and Jane. 2 W. Rob.

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junction with the fact, that the owners and crew of the vessel which had been run down were foreigners, residing abroad, and, upon this ground, were entitled to a more favorable indulgence from the court than might be allowed in the case of an English suitor. Lastly, that even if defective in some technical details, the contents of the plea were properly admissible, as in substance replying, either directly or indirectly, \* to the answers of the owners of The Anne [ \* 100 ] and Jane.<sup>1</sup>

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<sup>1</sup> The several pleas in the cause are here subjoined in a note.

*Substance of an Act on Petition.*

That on the 15th of April, 1841, the sloop Jeune Flavie, of forty-two tons burden, sailed from Shields, laden with a cargo of coals, and bound for Dunkirk, in the kingdom of France. That she proceeded on her voyage, without any thing occurring, until the morning of the 18th of April, when she arrived within four or five miles of Flamborough Head, to the northward. That at half-past two of the said morning, the wind being W. S. W., and the night very dark, the sloop steering S. by E. on the starboard tack, the master and others of the crew who were on deck at the time keeping a good look-out, observed a ship (namely, the schooner Anne and Jane) at a short distance, coming down upon them with the wind free, and studding-sails set; that the master and crew of The Jeune Flavie immediately hailed the said schooner to put her helm astarboard, in order to avoid them, but, instead of doing so, the helm was ported, and the schooner, in consequence thereof, struck the sloop amidships with such violence that in less than six minutes she sunk. That the master of the sloop, a passenger who was on board, and all the crew, with the exception of the mate, who went down with the sloop and was drowned, got on board The Anne and Jane, and went in her to Scarborough; and G. alleged, that at the time when the said Jeune Flavie was run down as aforesaid, her mainsail was lowered for the purpose of reefing it, and it was impossible for the master to have adopted any measures in order to avoid the collision. That the schooner Anne and Jane, having the wind free, might easily have avoided the sloop, and it was her duty to have kept a good look-out, and have gone clear of the said sloop. That the loss of the said sloop and of the effects on board was entirely owing to the want of skill and seamanship of the master and crew of the schooner Anne and Jane, and not to any neglect or misconduct of her own master and crew. Wherefore G. prayed, &c., &c.

*Substance of the Answer of the Anne and Jane.*

That on the 15th of April, 1841, the said schooner, of sixty-eight tons burden, and with a crew of five hands, the master inclusive, sailed in ballast for the port of London to Scarborough. That by half-past two, A. M., of the 18th of the said month of April, the said schooner was to the northward of, having previously rounded, Flamborough Head, and was sailing close-hauled on the larboard tack, with the wind neither from the W. S. W. nor free, as untruly alleged, but from the W., as it had been from ten o'clock P. M. of the preceding day. That the morning was dark and rainy, and the schooner's course cut Scarborough N. N. W. half W. That at such time, the master and two of the crew of The Anne and Jane, being on the deck, and keeping a good lookout, saw the sloop Jeune Flavie, the vessel proceeding in the cause, directly ahead, approaching, and then almost close to the schooner on the starboard tack, where-



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The Anne and Jane. 2 W. Rob.

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[ \*101 ]      \*PER CURIAM.

It has been observed by the counsel who have supported  
[ \*102 ] the admission of this plea, that the course \* which has been

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upon the said master, supposing the sloop would keep her wind, as it was her duty to have done, immediately directed the man at the helm to put the schooner's helm aweather, which he immediately did, when the schooner, answering her helm, flew off three points. That the master also, at the same time, hailed the sloop to keep her luff, but that those on board her put her helm up, and a collision instantly ensued by reason thereof, the schooner striking the sloop on her starboard side before the mast, within not more than two minutes from the time of her being first seen from the schooner's deck. That the master and crew of the schooner, finding that she was sinking, used their utmost exertions, and successfully, with one exception, to save the master and crew of the sloop, which shortly afterwards sunk. That about five, A. M., of the same day, a pilot took charge of the said schooner, and brought her into Scarborough Harbor, when it was found necessary to caulk and otherwise repair her, in consequence of the damage she had sustained; and B. denied that the schooner had her studding-sails set, either at the time of the collision, or at any time between then and 11 P. M. of the preceding day. He also denied that the master and crew of the sloop, at any time, hailed the schooner to put her helm astarboard, or that a good look-out was kept on board the sloop; part of the crew, to wit, two men, being in a state of intoxication at the time, and there being only one man and two boys on deck. And B. further alleged, that the sloop, being a fore and aft rigged vessel, was sailing with the wind free, and had her mainsail set, and not lowered, as falsely alleged. That the whole blame of the collision was imputable to the persons on board the sloop. Wherefore, &c.

*Substance of the Reply, the Plea in Question in the Case.*

That at the time of the aforesaid collision, the shock was so great that the crew belonging to the said sloop, Jeune Flavie, had only time to save themselves in the rigging of the said schooner, Anne and Jane; and said G. denied that there was a good look-out kept on board the schooner, for that, if such had been the case, the accident could not have occurred. That at the time of said collision there was only one person on the deck of the schooner, to wit, a boy, who was at the helm; that the whole of the crew were below, who, upon the said collision taking place, ran upon deck without their clothes, and having lowered the sails, applied themselves to the boat which was on deck, for the purpose of lowering the same, in order to save themselves, without endeavoring to render any assistance to the crew of The Jeune Flavie; that, on the contrary, it was because no aid of any description was afforded to them that the mate, Minniboo, who had succeeded in laying hold of the bowsprit, was drowned when the bowsprit broke under his weight; and said G. further alleged, that at the time of the said collision the whole crew belonging to the sloop were on deck, and occupied in reefing the mainsail, which was then lowered; that they had a lighted lantern, and a man at the head on the look-out; and said G. further denied that the wind was westerly at half past two, A. M., of the 18th of April. On the contrary, he alleged that, about half-past two of the said day, the wind veered to W. S. W., and remained in that quarter until after the collision; and the said G. positively denied that, at the time when the accident took place, any of the crew of the said sloop were in a state of intoxication, or were below, as alleged, but were at such time upon deck busily employed in reefing the mainsail, and on the look-out, as before alleged, and one of the crew ren-

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The Anne and Jane. 2 W. Rob.

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adopted in taking these objections is a novel mode of proceeding, and one that is \*irregular and inconvenient as [ \*103 ] regards the general practice of the court. This observation is perfectly true, so far as respects the usual mode of conducting proceedings in this court; at the same time, it is equally true that it is competent to parties in a suit to take such objections. In the case of *The Ville de Varsovie*,<sup>1</sup> an objection of the same kind was taken, not to the whole of an act on petition, but only to a part. In the argument at the bar, the same observation was made which has been pressed in the present instance, namely, that the raising the objection was an entirely novel proceeding, but Lord Stowell overruled it, and determined that he was bound to entertain the objection, if it was well founded. Upon a perusal of the papers, Lord Stowell thought that the objection was well founded, and directed the exceptionable parts to be expunged. Upon the authority of Lord Stowell's decision, then, it is clear that the parties in this suit, whether plaintiff or defendant, are entitled to raise objections to the adverse pleadings, if they shall think it expedient to do so. At the same time, I entirely accede to the observation, that it \*would be most [ \*104 ] inconvenient to the practice of the court if such objections were raised upon ordinary occasions, or upon slight grounds, because it would necessarily lead to delay, and an increase of expense to the suitors.

The question, then, which I have to determine is, whether, upon a consideration of its contents, this plea is so perfectly objectionable, either in substance or in form, that it must be altogether rejected; or whether certain portions of it are so exceptionable that the court must direct them to be either amended or expunged.

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dered every assistance in his power to prevent the mate from being drowned; and G. denied that the helm of the said sloop was ever put up or in any way shifted, from the time the schooner was first seen until the happening of the collision; and he lastly alleged that proceedings would have commenced at a much earlier period against the said schooner *Anne and Jane*, had not the owner of the sloop first endeavored by repeated application to J. M., the owner of the schooner, to obtain compensation, and when these endeavors were without effect, he, being a foreigner and ignorant of the proper mode of obtaining redress, subsequently made application to Lord Palmerston and to Monsieur Guizot, the Minister for Foreign Affairs in France, upon the subject of his loss, and that it was not until they both declined to interfere in his behalf that he discovered the proper mode of obtaining redress was to cause the said schooner to be arrested by process from the Court of Admiralty, in order to answer for the damage sustained. Wherefore, &c., &c.

<sup>1</sup> [Unreported on this point. *The Hebe*, 2 W. Rob. 146.]

Now, in all these cases, it is most desirable that the whole case of the parties proceeding should be fully stated in the first instance. It may occasionally happen that difficulty will arise in attempting to decide what is strictly in the nature of a reply, and what ought to have been stated in the first instance. It may, however, be laid down as a general rule for the guidance of practitioners, that whatever is pleaded in the nature of a reply must be either in contradiction of what is alleged in the answer or explanatory of averments in the defence, or else necessary to corroborate the original statements in the cause. Applying this rule to the contents of the plea now brought in, I certainly am of opinion that, in strictness, there are facts stated in it which ought, if stated at all, to have been set forth in the original act on petition. I now allude to the averments that have been pointed out by the counsel for the owners of The Anne and Jane respecting the absence of the crew of that vessel from on deck at the time of the collision, and their refusal to lend their assistance to the mate, Minniboo, who had succeeded in laying hold [ \* 105 ] \* of their bowsprit, and was drowned, as it is alleged, when the bowsprit broke, because no aid of any description was afforded by them. These averments, if pleaded at all, should, I think, have been pleaded in the act on petition ; and I further concur in the remark which was thrown out by the counsel of The Anne and Jane, that the averments in question are not, correctly speaking, matters of reply at all ; not being called for by any thing which has been stated in the answer. With regard to other portions of this plea, I am also of opinion that some of the facts pleaded do, as it appears to me, savor of repetition. I allude to the quarter in which the wind was blowing, and more particularly to the fact that the mainsail of The Jeune Flavie was lowered upon the deck, and that the crew were employed in reefing the sail at the time the accident took place. This averment is directly and distinctly set forth in the original act, and is pleaded twice over in this reply. Surely this repetition might have been avoided. With respect to the concluding averment, that the owner of The Jeune Flavie made the application as stated to Lord Palmerston and the French Minister for Foreign Affairs, before commencing his proceedings in this court, I certainly do not see in what way this statement has any relevancy to the issue in the present suit. Even assuming it to be admissible, I do not foresee any benefit which the party pleading it can derive from its admission. Having made these observations upon the parts of the plea which have been objected to, I must here notice that there are other parts of the plea to which no objection whatever is taken. The question therefore, is not whether I ought to reject the whole of

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The Anne and Jane. 2 W. Rob.

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\*this reply, — for that I cannot do, — but whether I ought [ \* 106 ] to direct it to be reformed by striking out those parts which ought to have been inserted in the original act, and those portions which are superfluous or irrelevant. If this had been a proceeding by a British owner, I should have viewed the objections which have been taken with more favor than I am disposed to entertain towards them in the present instance. In the case of a British suitor, the court would be warranted in holding him more strictly to the observance of the technical forms of its proceedings, because he would be more competent to form an opinion of what ought to be done, and would have better means of acquiring the necessary information. With regard to a foreigner, I think he is entitled to greater indulgence. Looking then, at the whole of this reply, and thinking, as I do, that there are some parts which are not strictly relevant, some parts which are manifestly superfluous, and some which certainly ought to have been pleaded in the original act on petition, yet upon the ground that it is the case of a foreigner, I conceive that it will be more conducive to the final attainment of justice in the cause if I admit the plea in its present form; I therefore decline to make any order for its reformation, and of course it must be understood that if more expense is incurred, and it shall turn out that the foreigner has made a complaint which he is not able to substantiate, the increased costs will fall upon him.

Upon the 13th of July, 1843, this cause was argued upon the merits before Trinity Masters.

\* PER CURIAM.

[ \* 107 ]

Gentlemen — It is to be lamented that the present action was not brought until twenty months after the time when the collision occurred; but some allowance must be made on account of the parties proceeding being foreigners, and, upon the present occasion, it fortunately happens that a protest was made by the master of The *Jeune Flavie* immediately after the collision, and there is no discrepancy of any importance between the contents of that protest and the subsequent affidavits. In the course of the argument, observations were thrown out respecting the amount for which the action has been entered; but, as I have observed in previous cases of this kind, these observations can have no bearing upon the point which you will have to decide, because the amount of the damage, if disputed, must be matter of future reference to the registrar and merchants, and must be determined by the rules and principles which are peculiar to such a form of inquiry. The decision which you will have to pronounce will be confined simply to the conduct of the

vessel proceeded against. With respect to the facts of the case, you will observe that the statements of both parties in the cause are, in many respects, the same. There is no difference with respect to the place where the collision occurred. There is, also, no difference as to the darkness of the night, and that the French vessel was proceeding from north to south, and the course of The Anne and Jane was towards the north. There is, indeed, a difference between the two parties as to the quarter from which the wind blew. On the part of The Jeune Flavie it is stated as W. S. W., the sloop [ \* 108 ] steering S. by E., and on the starboard \* tack; whereas the owners of The Anne and Jane say that it was blowing from the west. There is also a still more important difference, so far as I can comprehend it, as to the measures adopted by the masters of the two vessels. The persons on board The Anne and Jane say, that when The Jeune Flavie was first discovered they ported their helm, and immediately flew off three points, and that the collision took place in consequence of The Jeune Flavie having also altered her course. This statement is contradicted by The Jeune Flavie, and it is directly averred that they starboarded the helm, and that her course was never altered in the slightest degree. It appears to me, therefore, that the main facts which you will have to determine are: first, from what quarter you believe that the wind was blowing at the time of the collision; and, secondly, whether the measure of putting the helm to port, and going off three points, was a proper measure to have been adopted on the part of The Anne and Jane. If it were proper, The Anne and Jane would not be responsible for the damage; if, on the other hand, the measure was erroneous in point of seamanship, she would, in that case, be responsible. With regard to the alleged intoxication of the crew of The Jeune Flavie, the charge in question must, I think, be altogether dismissed from consideration; and I am clearly of opinion that there is nothing to show improper conduct, arising from any such cause, on the part of the crew of The Jeune Flavie. I do not think it necessary to trouble you with any other part of the case. You will have the kindness to consider the points to which I have directed your attention, and give me the benefit of your opinion with reference to this [ \* 109 ] \* collision, which was attended with the melancholy loss, not only of the vessel proceeding in the cause, but what is more important, the loss of a human being, as to whether the conduct of The Anne and Jane was that which ought to have been pursued under the circumstances of the case; and also whether any blame was attributable to the other vessel.

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The Highlander. 2 W. Rob.

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The Trinity Masters were of opinion that the fact of The Anne and Jane going off three points, as soon as her helm was put up, proved that she was going free at the time; that the sloop was on the starboard tack, and all the men on deck, because they had recently reefed the mainsail. They were also of opinion, that if the schooner had kept her course, the collision would not have occurred; that the damage was occasioned by her so altering her course, and that no blame was imputable to The Jeune Flavie.

Damage pronounced for, with costs.

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HIGHLANDER. Rendles.

(*Motion.*)

May 5, 1843.

A mortgagee is not entitled to arrest a vessel, for the purpose of enforcing bail for her safe return to this country.

Motion, on behalf of a mortgagee, for a warrant of arrest, refused, under the circumstances of the case.

THE affidavit to lead the motion in this case set forth, that "By indenture, bearing date 9th of October, 1840, A. S., the lawful owner of the ship, assigned to W. R. thirty-two sixty-fourth parts of the said vessel, subject to a right of redemption upon payment of the sum of 555*l.*, with lawful interest; and also with a power to the said W. R. to sell and dispose of the said thirty-two sixty-fourth parts, in case the said \*sum was not paid within the times mentioned in the indenture for repayment thereof; that two several sums, of 163*l.* and 198*l.*, part of the said sum of 555*l.* and interest, secured by the indenture, were not paid at the time specified, and now remain justly due and owing; and a further sum of 253*l.*, being the remainder of the said sum of 555*l.* and interest, will also shortly be payable; that application has been made repeatedly to the said A. S. for payment, but without effect; that the said ship is about to proceed to sea on a foreign voyage, without the consent or approbation of the appearer, the said W. R., and without giving the said appearer any security for his property or interest in the said vessel; and that the aid and process of the court is required, to restrain the said ship from proceeding on her said intended voyage until such security shall be given."



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The Sarah Jane 2 W. Rob.

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Under the circumstances stated in the affidavit, *Addams* moved the court to decree a warrant of arrest, at the suit of the mortgagee, until bail for the safe return of the vessel should be given; but the court, considering that there was no precedent for the application, and that it had no jurisdiction in the premises, declined to grant the motion.

Motion rejected.

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THE SARAH JANE.

May 12, 1843.

Owners of vessels, which have received salvage assistance, cannot safely enter into a settlement of a salvage compensation, which includes the interests of all persons concerned in the salvage, without procuring a general release in the first instance.

Salvage of 800*l.*, paid to the master of a salving vessel, under an agreement between the owners and master of the salving vessel and the owners of the vessel saved.

Action brought by some of the crew of the salving vessel, who were dissatisfied with the distribution of the 800*l.* so paid.

Defence of the owners of the vessel saved: — That the salvage remuneration had been settled under agreement, and that the master of the salving vessel, who received the money and signed the receipt, was a part owner, and that the other owners were also present at and assenting to the settlement in question; overruled by the court.

In this case the vessel *Sarah Jane*, whilst on her voyage from Cuba to the port of London, sprung a leak, which the crew were unable to keep under, and an American vessel, bound to New Brunswick, having hove in sight, the master and crew of The [\* 111] \* *Sarah Jane* abandoned the ship, and went on board the American vessel. On the following morning they fell in with The *Saucy Lass*, bound to London, on board whereof they immediately embarked, and, on the evening of the same day, they again fell in with their own vessel, The *Sarah Jane*. The mate and three of the crew of The *Sarah Jane*, and the mate and one seaman of The *Saucy Lass*, volunteered to go on board and take her into a port of safety. The two vessels then parted, and the six men, aided by some experienced pilots whom they had fallen in with, succeeded, after considerable difficulty, in bringing The *Sarah Jane* in safety into the harbor of St. Mary, in the Scilly Isles. The owner of The *Sarah Jane* being informed that his vessel had been taken into the Scilly Isles, immediately dispatched an agent to that place, where, upon his arrival, he found Captain Love, the master and part owner of The *Saucy Lass*, and Messrs. N. and A., the sole remaining owners of that vessel.



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The Sarah Jane. 2 W. Rob.

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An agreement was then made, between the agent of the owner of The Sarah Jane and the owners and the mate of The Saucy Lass, to pay them 800*l.*, in lieu of all demands for salvage; and, in the presence of all the owners, the master and the mate of The Saucy Lass, the sum of 800*l.* was paid into the hands of the master, who gave a receipt for himself, mate, crew, owners, and all others interested in The Saucy Lass, and this receipt was also signed by —, the mate.

Four of the crew of The Saucy Lass, being all the seamen who remained on board their own vessel, and who did not personally render any service to The Sarah Jane, being dissatisfied with \* the apportionment of the 800*l.*, entered an action for salvage in this cause. [ \* 112 ] The action was also entered on behalf of Lee Pope, the mariner who had gone on board the brig with the mate of The Saucy Lass, and who, it appeared, had been paid the sum of 38*l.* 8*s.* 6*d.* as his share of the salvage.

The act on petition, after setting forth in detail the facts of the case, as stated above, further alleged, on behalf of the salvors, that the master of The Saucy Lass proceeded to Scilly, leaving his crew with the schooner at Liverpool, for the purpose of arranging with the owners of the brig the amount of remuneration, but without any authority from the crew of the schooner to act for them; that the arrangement with the owners of The Sarah Jane was entirely without the privity or consent of the said crew; that, out of the 800*l.*, S. H., one of the salvors, had been only offered for his share the sum of 3*l.* 10*s.*, which he refused to accept; that J. P., another of the salvors, had made application to the owners of The Saucy Lass, for a share of the said salvage, but they refused to give him any share whatever; that Lee Pope, another of the salvors, remained on board the brig for about three weeks after she arrived at Scilly, and was then informed, by the mate of the schooner, that his (the said L. P.'s) share of the salvage was 50*l.*; and a few days afterwards the master of The Saucy Lass paid him 38*l.* 8*s.* 6*d.*, having paid him 1*l.* before, and told him that the balance of the said 50*l.* was deducted for expenses; that he (the said L. P.) received the said 38*l.* 8*s.* 6*d.* in the belief that the salvage had been legally settled and apportioned; that the said L. P. was never consulted about the settlement of the said salvage, nor did he authorize \* any person [ \* 113 ] to act therein for him, or on his behalf; that he (the said L. P.) has only been paid his wages, as a seaman belonging to The Saucy Lass, up to the day of his going on board the brig, and that, on leaving her, he had to pay his own expenses, and the expenses of his journey from Scilly home to Dartmouth.

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The answer of the owners merely pleaded the payment of salvage remuneration under the agreement made at St. Mary's, and that J. L., who signed the receipt as master, was also part owner of The Saucy Lass, and that the other owners were present at and assenting to the reference and award aforesaid.

For the owners of The Sarah Jane, *Addams* and *Bayford*.

*Haggard* and *Twiss*, *contra*.

JUDGMENT.

DR. LUSHINGTON. It would, I conceive, be impossible to lay down any general rule, with respect to questions of this description, which might not, if applied to all cases and circumstances, be productive of much inconvenience and injustice. If I were to hold that masters and owners possessed a general power to act for the rest of the crew, it is obvious, from past experience of the manner in which mariners have been sometimes dealt with, that they would often be deprived of that reward to which they are justly entitled. On the other hand, I feel that an injury might be inflicted upon the owners, if it was laid down as a rule of universal application, that in no case whatever neither the master nor the owner can act on behalf of the [ \*114 ] crew. In giving my decision in this case, I will, in the first instance, shortly advert to some of the facts before I proceed to the consideration of the principles which are applicable to the particular circumstances of the case itself. The Sarah Jane was a derelict, and she was saved by the assistance of The Saucy Lass. The persons who succeeded in conducting the vessel into a port of safety were the mate and three of the crew of The Sarah Jane, and the mate and one seaman of The Saucy Lass; and only one of these, the seaman Lee Pope, is a party to the present proceedings. The suit for salvage, therefore, is brought principally by persons who were not actively employed in the performance of the salvage service. The defence to the suit is, that the sum of 800*l.* has been paid, and that it has been received without any objection from the owners, the master, the mate who went on board The Sarah Jane, or any other persons, with the exception of the promoters of these proceedings. It has also been contended that the suit has been instituted not for the purpose of disputing the amount of the compensation which has been paid by the owners of The Sarah Jane, but with a view of enforcing a different distribution from that which is proposed to be made by the owners and the master to the seamen themselves.

Now I must first consider in what situation the persons now suing

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ought to stand, before I determine whether the facts which I have stated form a valid defence to the action. It is not attempted to deny that they are salvors, although they were not personally engaged in effecting the rescue of The Sarah Jane. Had such a proposition been attempted, it could not have been contended for with \*effect, in the face of the acknowledged practice of the court; [ \* 115 ] because it has been the rule of this court, from time immemorial, to allow persons who remain on board a salving ship, to be considered as co-salvors, although the court has repeatedly made a distinction in favor of those persons who actually have incurred the difficulty and peril of the salvage enterprise. Indeed, the principle upon which they are admitted is as old as holy writ; for it is there stated, that they who continued in their tents, divided the spoil with their brethren. *Prima facie*, then, the parties suing have an interest which entitles them to institute the present suit; and in order to debar them, they must be barred by some circumstances which have that legal effect. What are the circumstances which have been relied on by the counsel for the owners of The Sarah Jane? They are the following, namely, that the salvage reward has been *bonâ fide* paid, and has been received by Joseph Love, the master of The Saucy Lass, professing to act on behalf of himself and the owners, mate, and crew of that vessel, and of all other persons interested in the transaction in question. A receipt for the money has been given to this effect; but the validity of this receipt is denied, upon the ground that he had no authority to give such receipt without the consent of the whole of the crew. The question, therefore, arises, whether the master was authorized to act for the crew, without their consent being directly or indirectly first given. It is unnecessary, I think, to revert to the principles which I examined in the case of The Britain,<sup>1</sup> and in other cases, for the purpose of \*showing that, in all [ \* 116 ] ordinary cases of salvage, neither the owners nor the master have a power of binding the crew, without their previous consent. This point has not been argued in the present instance, and I, therefore, feel that it is unnecessary for me to travel further into the disquisition. There is, however, another point which has been strongly urged, and to which I must now more immediately address myself, namely, that acts done by a person presuming to act as an agent, without previous authority, may become valid by the subsequent recognition of the individual whom such agent professes to represent; and this recognition may be effected either by express assent, or by

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<sup>1</sup> Robinson, Jr. Admiralty Reports, vol. i. p. 41.

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some act on the part of the individual represented which necessarily carries with it the inference of his approbation and consent. This principle, it has been contended, directly applies to the circumstances of the present case, and under its application the promoters of this suit are conclusively estopped from carrying on the proceedings. Now, with regard to Lee Pope, one of the party proceeding, I am of opinion that the principle contended for does certainly apply. His case, I think, stands essentially distinguished from that of the others, and for the following reason: that, according to his own statement, he remained on board the brig after her arrival at Scilly; that he was then informed by the mate that the sum of 800*l.* had been received, that his share was 50*l.*, and a few days after, the master paid him 38*l.* 8*s.* 6*d.*, having deducted certain expenses. It is averred on his behalf, that he received this money under a misapprehension on his part, that the salvage had been legally settled, and that he [ \* 117 ] was bound to whatever had been done. \* Looking to the *res gestæ* of the case, I must confess that I am not inclined to place much reliance upon this averment. In the first place, I apprehend, the receipt of the money was *primâ facie* a complete confirmation of the arrangement which had been effected between the owners of the two vessels and the master of The Saucy Lass. He could only apply for the share of the money, under a conviction that he was legally entitled so to do; and having so applied and received it, he has, to all intents and purposes, ratified the arrangement in question.

As against third parties, I am most clearly of opinion that he has stopped himself, by his own acts, from instituting a suit of this kind, and I am, therefore, bound to hold that he is legally precluded from proceeding further in the cause.

With respect to the other persons, they stand in a somewhat different predicament. It is stated that Hearne made an application for his share of the salvage, and that the sum of 3*l.* 10*s.* was offered to him, but he refused to accept it, because he thought it insufficient. Stone, another of the salvors, it appears, also made a similar application, which was rejected altogether. It does not appear whether any application was made on behalf of the two remaining salvors. It has been contended that such an application, on the part of the parties making it, is an estoppel against their right of carrying on the present suit. I cannot accede to this proposition, because I think that if they had otherwise a right of proceeding in this action, it would be contrary to all principles of equity and justice to hold with too much severity against a mariner, that the mere fact of [ \* 118 ] making application to the owners, \*in the first instance,

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should bar him from the legal prosecution of his redress in this court. It has been further contended, on behalf of the owners of The Sarah Jane, as an objection to the suit, that it is instituted by the promoters of it, not for the purpose of disputing the amount of the salvage which has been paid, but in order to enforce a different distribution of it. If my memory does not deceive me, the same argument was urged in the case of The Britain, and I am still of opinion, as I was in that case, that the objection in question is not of any importance whatever. I have felt some anxiety, in considering this case, to discover whether the recent act of parliament would enable me to apply the provisions of the statute to the circumstances of the case, because, as it appears to me, the real justice of the case would be, to call upon the owners of The Saucy Lass to bring in the money which they have received, and to compel them to a fair and just distribution. With this view, I have carefully examined the statute, 3 & 4 Vict. c. 65, and I regret to say that, in my construction of the act, the true meaning of the statute is, that application must be made for a distribution within fourteen days after making the award, or the actual payment of the money. I have, therefore, I regret, no means of affording assistance to the parties under the act of parliament. Upon the whole, then, I must pronounce that the legal right of the seamen to sue, with the exception of Pope, is not affected by any of the circumstances of the case; and I am further of opinion, that I have no discretion whatever to interpose any obstacle to their exercise of this right. I regret much the hardship that will be experienced by the owners of The Sarah Jane, in \*being thus called upon [ \* 119 ] a second time to pay a salvage remuneration. At the same time, I hope it will be a warning, in future cases, that owners cannot safely enter into a compromise of this description, which includes the interests of all persons that have rendered service to their vessel, without procuring a release from all parties interested, or incurring a risk of the consequences. In the present instance, the owners of The Sarah Jane have chosen to encounter the risk of these consequences, and these consequences they must bear; for I cannot, as a matter of indulgence to them, inflict legal hardship upon others.

Upon the 26th of May, the court awarded 50*l.* each to Harne and Stone, and 20*l.* each to Diamond and Airs, who were apprentices, with the costs.

THE RELIANCE, Green.<sup>1</sup>

May, 26, 1843.

Where any portions of a wrecked vessel have been recovered, the mariners are entitled to sue against the proceeds for their wages, although no freight has been earned; and their title is not divested by the circumstance that the portions of the ship which have been preserved, were preserved not by the exertions of the crew, but by third parties.<sup>2</sup>

A summary petition, in a suit for wages, admitted on behalf of the widow and administratrix of a deceased seaman, the whole of the crew, with the exception of one man, having been lost.

THIS was a question as to the admissibility of a summary petition in a suit for wages, promoted by the widow and administratrix of one of the seamen of *The Reliance*, an East Indiaman, wrecked on the French coast, in the month of November last.

The facts of the case are sufficiently noticed in the judgment of the court.

In support of the petition, *Haggard* submitted — That a similar petition had been held admissible in the case of *The Neptune*, and the facts of the case sufficiently brought it within the principle adopted by Lord Stowell in deciding the case of *The Neptune* [ \* 120 ] ; that the decision of Lord Stowell \* had never been reversed; on the contrary, the principles which it laid down had been directly confirmed by Lord Lyndhurst, in the case of *Jesse v. Roy*.

*Addams, contra* — That there was an important distinction between this case and the case of *The Neptune*, inasmuch as, in the case of *The Neptune*, portions of the vessel and of the cargo were saved by the exertions of the crew. This important ingredient was wanting in the present case.

## PER CURIAM.

The present question arises upon the admissibility of this summary petition. The facts of the case, as far as they are necessary to be stated, are as follows: The vessel sailed from this country for the East Indies in June, 1841. She arrived at Bombay, and subsequently

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1 [s. c. 2 Notes of Cases, 347.]2 [See *The Neptune*, 1 Hagg. Ad. R. 227, note.]



proceeded to Whampoa and China. The wages of the seamen were paid up to the time of the vessel leaving China. The homeward voyage was commenced in March, 1842, and in the progress of that voyage the ship was unfortunately lost upon the French coast, in the month of November last. No freight was earned on the homeward voyage, but a part of the hull of the ship, and some of the stores and materials were saved; but it is not alleged in the petition that they were saved by the exertions of the crew. The widow of one of the mariners now sues for the wages due to her deceased husband on the homeward voyage; and, in support of her act on petition, the court has been referred to the decision of Lord Stowell in the case of *The Neptune*, reported in 1st Haggard, p. 227.

\*It has been observed by the learned counsel for the [ \* 121 ] owners, that a material difference exists between the circumstances of this case and the case of *The Neptune*,<sup>1</sup> inasmuch as, in the case of *The Neptune*, a part of the ship was preserved by the exertions of the mariners; but in the present case, the whole of the crew, with the exception of one man, were unfortunately lost, and the salvage of the portions of the vessel which have been preserved was effected by the exertions of other parties. This fact undoubtedly furnishes a distinction between the two cases, which in many other particulars very closely resemble each other; and the question which I have now to determine is, whether this circumstance forms such a distinction as should lead me to reject this summary petition.

If the circumstances of the two cases had been precisely similar, I should have held myself concluded by the decision of Lord Stowell, in the case of *The Neptune*, not only as being the decision of one of the most able judges who ever sat in this chair, but as being conformable to all principles of law and equity. Moreover, the judgment in that case was pronounced in 1824, and came under the knowledge of Lord Tenterden in his last edition of his work on Shipping, and it has also been confirmed by Lord Lyndhurst in the judgment in the Court of Exchequer cited by Dr. Haggard.

Now, what was the principle upon which Lord Stowell decided the case of *The Neptune*? The ground upon which his decision in that case was founded is this, that the mariners were entitled to their wages if they had performed their duty to the utmost of their power; or, to use Lord Stowell's \* own words, that [ \* 122 ] "they were entitled to cling to the last plank in satisfaction of their wages." I have most carefully considered the judgment in

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<sup>1</sup> [1 Hagg. Ad. R. 227.]



that case before I came into court, and I am satisfied in my own mind, that, although in the course of his judgment he discusses at considerable length the laws and usages of other countries, as to seamen being salvors, he does not form his ultimate decision upon that reasoning. In so doing, he was, I conceive, perfectly right. Let us for a moment adopt the principle of salvage in considering a case of this description, bearing in mind that seamen are remunerated by fixed wages. What would be its effect? If the mariners were to be considered as entitled to their wages, in a case of this nature, as salvors, it would be repugnant to every principle upon which salvage remuneration is awarded. The remuneration of salvors is proportioned according to the extent of the services rendered, the danger to which they are exposed, and the exertions they are compelled to use. If these considerations were applied to cases of wages, the result would be, in some instances, to give the seamen more than they were justly entitled to; in others, to deprive them of a fair compensation.

It is quite clear to my mind, that Lord Stowell did not form his judgment upon any such ground. To look further into the principle, if the title to wages is grounded upon the doctrine of salvage services performed by the mariners, there might be cases when the measures, tending to the ultimate preservation of the ship and cargo, might be commenced by the united exertions of the whole of the

crew, and a moiety of them might be drowned before those [ \* 123 ] measures were effected. According \*to the argument advanced against the admission of this petition, those who lost their lives would be deprived of any share in the remuneration; in other words, if a seaman died by the act of God, in the actual performance of his duty, according to the doctrine contended for, he would be deprived of his share of the reward. The injustice of such a doctrine is apparent. It is unnecessary to pursue the subject further, because, as I have already observed, Lord Stowell, in deciding the case of *The Neptune*, did not found his judgment upon any such principle. The ground upon which he introduced the principle of salvage, in delivering his judgment in that case, was, that it was impossible to conceive a case where the materials of the vessel had come ashore, and been collected by the labor of the crew, in which they would not be entitled to benefit by their exertions.

In introducing the question, with his usual foresight and clearness, he says, "On all views of the relative justice between the parties, there can be no doubt that the rule of wages has the advantage upon the clearest ground; but take it upon the most naked principles of law applying to it, the contract covers the whole ship, one part as well as

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The Caroline. 2 W. Rob.

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another, with the mariners' lien. A part separated by a storm is not disengaged by that accident from the lien. If it be recovered, it is recovered as a part of the primitive pledge mortgaged to the mariner. Again, when does the authority of the master cease? His authority certainly does not merge in the misfortune, nor are the seamen at liberty, without staying a reasonable time for the recovery of parts of the ship and cargo, (if there be any prospect in his judgment of such recovery,) immediately \*to disperse themselves over [ \* 124 ] the country on whose shores they have encountered the mischance, without some discharge from him."

Being clearly of opinion that the case of *The Neptune* is applicable to this case, I must hold that, if the mariner had survived, he would have been entitled to his wages; and it is not disputed that the administratrix, the party bringing this suit, stands in the same position as the seaman if alive would have done. I must, therefore, admit the summary petition.

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### THE CAROLINE, Derelict.

June 7, 1843.

Award and apportionment decreed by the court in a case of derelict.

In this case, *The Caroline*, with a valuable cargo of general merchandise, whilst on her voyage from Liverpool to the Cape of Good Hope, struck upon a sand to the east of Wicklow Head, upon the 10th of January, when the master and crew got into the jolly-boat and abandoned her in a sinking state.

Upon the following morning, the vessel was discovered drifting in the Irish Channel by *The Emily*, a small schooner of seventy-four tons, with a crew of six persons, bound from Liverpool to Terceira. The master of *The Emily* placed three of his men on board the derelict, and accompanied her in *The Emily* to Holyhead. When boarded by the salvors, the hatches of *The Caroline* were open, the tiller was loose, the lashing of the binnacle was cut, and the binnacle was lying in the gangway, and between two and three feet of water were in the hold.

The value of the ship and cargo was 15,000*l.*, and \* the [ \* 125 ] court allotted 1,800*l.* to the salvors, and decreed the follow-

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ing distribution: 600*l.* to the owners of The Caroline, as a compensation for the risk encountered by their vessel in being deprived of the proper complement of hands, and also for their loss of the freight, which was undertaken to be provided for The Emily homeward from Terceira, the prosecution of the voyage being prevented by the rendering of the salvage service; 400*l.* to the master; 250*l.* to the mate; and the remainder amongst the four seamen.

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THE TWO SISTERS, Davison.<sup>1</sup>

June 9, 1843.

Suit for wages. Defence of the owners — That the wages had been forfeited by the mariner's desertion; not sustained.

Construction of the Act 5 & 6 W. IV.

THIS was a cause of subtraction of wages, promoted by John Hutton, who served as second mate on board the vessel, in a voyage from Glasgow to Jamaica and back.

A further action was entered, at the suit of James Grant, a seaman, and James Thomas, the steward on board the same brig, in the sum of 150*l.*; and it was agreed between the proctors in the respective suits, that the judgment in this case should be decisive upon both the issues. The proceedings were by plea and proof.<sup>2</sup>

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<sup>1</sup> [s. c. 2 Notes of Cases, 420.]

<sup>2</sup> On the fourth session, Hilary Term, 10th February, a summary petition, consisting of ten articles, was brought in on behalf of the plaintiff, pleading: —

1st. That, whilst the vessel was lying at the port of Glasgow, J. H. was hired to serve as second mate on board the brig, at the rate of wages of 3*l.* per month; that on the 2d of February, 1842, he signed the ship's articles, and proceeded with the ship to Jamaica, where she arrived on the 28th of April, 1842.

2d. That the vessel, having discharged part of her cargo at Jamaica, and taken in ballast, sailed from Jamaica on the 13th of May, and arrived at Belize on the 28th of said month; that on the 19th of August, 1842, having discharged the remainder of her cargo, and taken on board a fresh cargo of logwood, &c., &c., she again sailed on her homeward voyage, and arrived at Cork on the 13th of November following.

3d. That, on the arrival of the ship at Cork, orders were received by the master to proceed with her to London; that, on the 22d of the said month, the said ship set sail on said voyage to London, and, having sustained considerable damage by stress of weather, in the progress of the said voyage, she bore up for Swansea, and, on the

\* In support of the claim, *Robinson* submitted — That [ \* 126 ] the mariner, having served on board the vessel in her voy-

27th of November, came to an anchor inside Swansea Light, waiting for sufficient water to enter the harbor, until the 29th of the said month of November; that on the said day, with the assistance of a steamboat, she was enabled to enter the said harbor, and, in the afternoon of the said day, was moored in safety alongside the quay of the town of Swansea.

4th. That, on the following day, carpenters from on shore were received on board by the master, and were employed in clearing away the wreck and preparing for the requisite repairs, in which service the said J. H., as well as the rest of the crew, assisted; that, at between five and six o'clock, P. M., the master being at that time on shore, and the brig in charge of J. B., the chief mate, J. H., J. G., and J. T., severally went on shore, by permission of the chief mate, with injunctions to return in time for work next morning; that, in consequence of such permission, the several parties remained on shore all night.

5th. That, on the following day, J. H. returned on board said ship, in company with J. T., and found there J. G., who had returned on board a few minutes previously, when said J. H., not seeing the chief mate, reported himself to the master, who was then walking the deck, and, at the same time, asked said master what directions he should give for the employment of the crew, at the same time expressing himself as willing, in the absence of the chief mate, to direct or perform any duty which might be required of him; that said master refused to appoint him any office or duty on board the said brig, saying, — I don't know you; you have taken your own discharge; you may go ashore; or words to that effect; that a similar answer was returned to J. G. and J. T., and, in consequence of the refusal of the master to receive and employ them on board, the said parties returned on shore; that in the course of that day, and also on the day following, whilst the brig remained moored alongside the quay, J. H. again went on board and applied to the master, offering to resume his duty, but without effect; said master, at such time, also refusing to pay him his wages, or to make out his discharge, or to allot him the usual allowance of the ship's provisions, or permit him to cook his own provisions or to sleep on board.

6th. That, on the evening of the next day, the ship was removed to the opposite side of the river, to a dry dock or slip, for the purpose of completing the necessary repairs; that, in the course of the day, J. D., the master, met with an accident, and, having broken his leg, was incapacitated from doing his duty on board, and was removed on shore; that T. D., the sole owner of the brig, therefore took the management of the ship's affairs into his own hands, and J. H., the plaintiff, doth expressly allege that, during such time and until the 13th of said month of December, when he finally quitted Swansea, the said J. H. every day, or very frequently, went on board the brig and applied to said T. D., or whosoever was in command, to be reinstated in the performance of his duty, or to be paid the wages justly due to him, both of which requests were peremptorily refused by said T. D., or other in command, who told said J. H. that he knew nothing about him, and ordered him to quit the brig and go on shore.

7th. That, finding his applications wholly ineffectual, said J. H., on or about the 13th of December, quitted Swansea in company with said J. G. and J. T., and proceeded on foot to London.

8th. That the ship having subsequently arrived in the port of London, to wit, on

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[ \* 127 ] age to Jamaica and back, was \* *prima facie* entitled to his wages, and the *onus probandi* lay with the owners, who

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or about the 17th of January, 1843, the said J. H., upon her arrival, applied for and obtained the remainder of his clothes and effects, which had been detained on board, but that he was again refused the payment of his wages, and his discharge from the service of the said brig.

9th. That said J. H. at all times, during his continuance on board in the service of the said brig, well and truly performed his duty as second mate, &c., &c.

10th. The usual concluding article.

This summary petition was admitted without opposition, and, on the 21st of February, *Clarkson* brought in an allegation, which was admitted on behalf of the owners.

This allegation pleaded : —

1st. In contradiction of the third article — That it was untruly pleaded, in the third article of the summary petition, that the ship was safely moored alongside the quay of Swansea town, in the afternoon of the 29th of November. On the contrary, that the pier or quay, off which the said vessel was moored, and where she continued till the 2d of December following, before which time she could not be taken in safety up the harbor, owing to the neap tides, was, in the then state of the weather, a place of considerable danger, from the heavy sea rolling into that part of the harbor, &c.

2d. In contradiction of the fourth article — That J. D., the master, went on shore on the 29th of December, to arrange for getting the vessel on the slip, for the purpose of her repairs; that, prior to his going on shore, he gave strict injunctions that none of the crew, on any account whatever, should go on shore during his absence, owing to the dangerous position of the vessel; that, notwithstanding the premises, at about half past twelve, P. M., J. T., the steward, and, at four o'clock, the said J. H., the second mate, and T. G., the seaman, and, at half-past seven, H. B., the chief mate, respectively went on shore, leaving the vessel in a situation of great peril, as she was found to be by the said master, on his going on board in the evening to see that all was right, &c.

3d. That on the following day, 1st of December, J. G. came on board, and demanded his wages and discharge, which said master refused to give him, and ordered him to resume his duty, to which the said J. G. replied "he would be d——d if he would," or to that effect, and took himself on shore again; but that neither T. H. nor J. T. ever came or attempted to come on board the said vessel, &c., &c.

4th. That, early in the morning of the 2d of December, T. D., the owner of the said vessel, arrived by the mail at Swansea, at which place it was blowing a strong gale of wind, and the sea was rolling in so heavily that the moorings of the said vessel suddenly giving way, she was placed in great peril; that the master, however, and such of the crew as were still on board, fortunately succeeded in getting her removed, though not until the said vessel had received very considerable damage by having her timber heads, covering boards, and paint streak torn away; that, on the evening of the said day, the vessel was taken up the harbor, and for the first time placed in safety; that the said J. H. and his shipmate continuing absent from the said vessel during that day also, (although both on that day and the day previous provisions had been cooked for them,) they were treated as deserters by the said master, and the circumstances attending their desertion were duly entered in the log, pursuant to the statute 5 & 6 W. IV. c. 19, s. 9, &c., &c.

sought to deprive \*him of his claim; that the defence to [ \*128 ] the action was grounded upon a charge of desertion, and by \*the terms of the fourth article of the owner's plea, the [ \*129 ] defence was further confined to desertion under the statute.

\* The question, therefore, was narrowed to the issue, whe- [ \*130 ] ther the owners had brought their defence within the provisions of the act of parliament; that, looking to the decision in the Court of Exchequer, in the case of *McDonald v. Joplin*, it might be questioned whether the statute 5 & 6 W. IV. applied at all to a case of the present description. Assuming that it did apply, it was clear that the facts set up by the owner in his allegation did not bring the defence within the provisions of the ninth section of the act which had been relied on; that the ninth section expressly defined a desertion under the statute to be an absence from the ship, not only without leave, but under circumstances plainly denoting an intention not to return; and the definition could not, in fairness, be applied to the circumstances of the case, inasmuch as it was clear that the mariner returned on board on the following morning, and would have continued his services, but was told by the master that he knew nothing about him, and that he had taken his discharge on the previous evening.

That, as regarded the evidence in the cause, which was more than usually conflicting, the balance of credibility was decidedly in favor of the plaintiff; the principal testimony for the defence consisting of three boys of nineteen, and of the owner of the vessel himself, who

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5th. That the said J. H. and J. T. for the first time returned to the said ship about six days after, and whilst she was on the slip undergoing her repairs, but that the said T. D., the owner, then on board and in charge of the ship, refused to receive them, expressly telling them that they were deserters, and that both their wages and clothes, and other effects on board, were forfeited; that the said J. H. and some of the others got on board the said vessel early on the evening of the 12th of December, and, unknown either to the master or the owner, secretly took away some of their clothes, &c., &c.

6th. In contradiction of the eighth article, pleads the taking out a warrant from the Thames Police Office against the owner, by J. H., upon the ship's arrival in London, but that the magistrate refused to make any order for the payment of the wages schedulate; and that the said owner, thereby considering the said claim for wages at an end, voluntarily, and purely out of charity gave up to the said J. H. the residue of his clothes.

7th. In contradiction of the ninth article, denies that the said J. H. conducted himself with propriety and discharged his duty faithfully whilst on board the brig; for that on two occasions he absented himself from the said vessel, namely, once for two days, whilst the ship was at Belize, and a second time for four days, whilst she was at Cork, &c., &c.

8th. Concluding article.



might have been objected to *in limine*, upon the ground of interest, had it been deemed of sufficient importance to do so. On the other hand, the evidence in support of the mariner's claim was confirmed by the testimony of an adverse witness, Packhorwood, and also still more strongly by the probabilities of the case itself; inas-  
 [ \* 131 ] much as it was not likely \* the mariner would wilfully incur the forfeiture of his wages at the very last moment, by deserting the ship, when almost within the port of her discharge.

Lastly, that even if the mariner had wilfully abandoned the ship *sine animo revertendi*, in the present instance, the charge being laid under the statute, was not brought home in such a shape as would entail the forfeiture of the entire wages. That, in order to work such an effect, the statute requires that the circumstances attending the desertion should be noticed in the log-book at the time, and certified by the signature of the master and the mate, or some other credible witness; and this form had not been complied with.

Upon the ground, therefore, of a deficiency of *legal proof*, the defence of the owners could not be sustained, and the mariner, in failure of such proof, was entitled to his wages.

*Addams, contra* — That the evidence in the case was undoubtedly of a most conflicting character; at the same time, he denied that the balance of credibility preponderated in favor of the party promoting the suit; that two of the witnesses in support of the mariner's claim, Grant and Thomas, were *in eodem delicto* with the plaintiff, and were moreover themselves embarked in a similar suit, the result of which was dependent upon the issue of the present action. With respect to the third witness, Kift, the publican, he had admitted, in his answers to the interrogatories, that Hulton, Grant, and Thomas, were in his debt, and that he did not believe that they have any means  
 [ \* 132 ] of paying him save out of the \* wages which they have earned, or may hereafter earn; that the whole of the plaintiff's witnesses, therefore, had a kind of contingent interest in the result of the suit, which rendered their testimony open to very considerable exception. That on the part of the owners, independent of the evidence of the three seamen of The Two Sisters, there was the testimony of the custom-house officer, a witness wholly disinterested, and without impeachment, and his evidence established, beyond dispute, that Hulton was absent from the vessel for two consecutive nights, without leave; and this fact, coupled with the *res gestæ* of the case, was sufficient to bring the defence within the words of the statute: "for any period, however short, under circumstances denoting an intention not to return." That even if the court should be disposed to adopt the objection which had been raised, that the offence was not made out



under the 9th section of the Act 5 & 6 W. IV., the owners were still entitled to the forfeiture of the mariner's wages, under the general maritime law, which had not been abrogated by the statute. This point had been distinctly laid down by the court, in the case of *The Westmoreland*.<sup>1</sup> That the alleged desertion was not confined to a charge of desertion under the statute, as had been suggested. The offence was charged in sufficiently comprehensive terms, in the owner's plea, to include it under the general law, and by that law, an abandonment of a vessel, even in the port of discharge, without leave, was a desertion entailing the forfeiture of wages. That this penalty would still more justly \*attach, in the present case, [ \*133 ] because the vessel was not only *in itinere* at the time, but, from the damage she had sustained, was, moreover, in especial need of the assistance and services of the crew.

*Robinson*, in reply — That the case of *The Westmoreland* was distinguishable from this case in this respect, that no attempt was made in the pleadings, in that case, to charge the offence under the statute 5 & 6 W. IV. The statute in the case of *The Westmoreland*, was merely pleaded, to the effect that the ship's articles had been signed, in compliance with the statute in question. That, as regarded the present case, it was immaterial whether the seaman's claim was to be decided by the statute, or by the general law; because it was equally clear, in either case, that the defence of the owner was altogether deficient in legal proof that there had been any abandonment of the ship *sine animo revertendi*. That, both under the general and the statute law, such an abandonment ought to be proved, in order to constitute a desertion entailing a forfeiture of the wages. That the utmost offence which the facts of the case established against the seaman was an absence without leave; and this offence was not brought home in such a shape as the 7th section of the act required, in order to secure the penalties awarded by that section. That if it was intended to deal with the case under the general law, the total desertion not being established, the mariner was entitled to the whole of his wages, under the authority of the decision in the case of *The Blake*.

JUDGMENT.

DR. LUSHINGTON. This suit is brought by John Hulton, who served \*as second mate on board this vessel, *The* [ \*134 ]

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<sup>1</sup> A. R. Robinson, Jun., 221.

Two Sisters, on a voyage from Glasgow to Jamaica and other places, and back to this country. The vessel arrived at Cork, on her homeward voyage, where the master received directions from the owner to proceed to London. Upon the 22nd of November last, she sailed from Cork for London, but, in the course of her voyage, being much damaged by stress of weather, she was compelled to put into Swansea. Up to this period, John Hulton continued to serve on board, and having performed his duties, which is not denied to this extent, *primâ facie*, he is entitled to his wages. The payment of these wages is resisted by the owner, upon the ground of desertion, and the *onus probandi* lies upon the owner. The issue, therefore, which I have to determine is, whether a desertion, in the legal acceptance of the word, and carrying with it a forfeiture of his wages, has been proved against the mariner in this cause.

I will now consider, in the first place, the facts which are alleged on the part of the owner, and the evidence which he has produced in support of them. And I may here observe generally, with respect to the evidence before the court, that it is extremely deficient in precision, especially in regard to dates, and upon this account is most unsatisfactory. (The learned judge here recapitulated the contents of the several articles of the responsive allegation, and proceeded to observe)—The averments in this allegation, though extended in various articles, in substance amount to this: that John Hulton quitted the vessel on the 29th of November, and did not return at all for nine or ten consecutive days. The first question, therefore, is, [ \* 135 ] \* assuming the fact as pleaded to be true, does this fact constitute desertion in the legal acceptation of the word? In considering this point, I must consider it, in the first instance, with reference to the recent act of parliament, 5 & 6 W. IV., because, as has been observed in the argument, the statute has been specifically pleaded in the fourth article of the allegation, and the entry in the log purports to have been made in pursuance of the provision contained in the ninth section of the statute.

Since the case was argued, I have referred to the case of *M'Donald v. Joplin*, and the decision in that case, it appears to me, is at once decisive upon the point in question, and for this reason, namely, that the Court of Exchequer was of opinion, in that case, that the ninth section of the act solely applied to cases of desertion when the ship was in foreign ports, and before her arrival at the port of discharge. Baron Parke, in putting a question to counsel, speaks of "parts beyond seas," and the vessel, in this case, it is manifest, was not in parts beyond seas, neither was she in the port of delivery. In a judgment deemed of so much importance, the question must have been carefully considered, and the judgment of the Court of Exchequer, being a deci-

sion upon the construction of an act of parliament, would be binding upon this court, even if I had been disposed to take a different view of the statute ; but my opinion coincides with that of the Court of Exchequer. The words of Lord Abinger, in delivering the opinion of the Court of Exchequer, were these : “ The 9th section may be considered as applying to the case of the desertion of a ship whilst in foreign parts, and before her arrival at her port of delivery.” In effect, therefore, \* the court virtually decided that it does not apply to [ \* 136 ] any act of desertion in the British port, and where the vessel is not in parts beyond seas at the time. As it is desirable that this section of the act, and the construction which it has received in the Court of Exchequer, should be well understood, I will read the words of the section in question. The words of the 9th section are as follows : “ That an absence of a seaman from the ship, for any time within the space of twenty-four hours immediately preceding the sailing of the ship, without permission, or for any period, however short, under circumstances plainly denoting that it was his intention not to return thereto, shall be deemed an absolute desertion.” What is the construction which the Court of Exchequer has put upon these words ? It has held, that the earlier words were strictly confined to the conduct of a sailor prior to the sailing of a ship from her port of clearance, and that the latter part of the section exclusively referred to what was done in parts beyond seas. It has also further held, that the 7th section of the act especially provides for cases of temporary desertion, under other circumstances than those already adverted to. The necessary consequence of this decision is, that it is impossible for the court to pronounce that the present case is a case of desertion under the 9th section of the statute. Having arrived at this conclusion, I will next consider whether any other part of the statute applies to the present case. Now the only other section which could have any application to the circumstances of the present case, is the 7th section, which provides in the following terms. (Court read the 7th section.) Does then the alleged desertion of this \* mariner come within the [ \* 137 ] provision of this section ? I am clearly of opinion that it does not ; and for this reason, that the 7th section expressly purports to provide a penalty for temporary absence from the vessel in cases not of absolute desertion, or not treated as such by the master ; and in the present case, the averment of the owner is an absolute desertion on the part of the mariner, and that it was treated as such, and the entry in the log was made pursuant to the statute. For this reason, therefore, I must dismiss the 7th section also from my consideration in deciding this case, because it applies to temporary, and not to absolute desertion.

There is, I regret to observe, considerable ambiguity in this statute, and the 7th section, in my opinion, refers to a desertion intended to be, but not in fact included in the 9th section, viz., a desertion in a British port, which is neither the port of clearance, nor the port of delivery, nor in parts beyond seas. Upon the whole of this part of the case, then, I am of opinion that the defence set up by the owner is not borne out by the statute which has been pleaded. At the same time, I think that if the acts done constitute a desertion, under the ancient maritime law, I must pronounce for the forfeiture of the wages. The ancient law, I conceive, has not been abrogated by the statute, except in the cases to which the statute exclusively applies. The court, therefore, is not prohibited by the statute from resorting to the ancient law in a case of this description; if it were so prohibited, the consequence would be that there could be no desertion in a British port, not being the port of clearance; a consequence so productive of mischief in its effects, that no court [ \*138 ] would adopt such a conclusion, \*unless it were absolutely compelled to do so by the imperative terms of the statute itself.

I will now again refer to the circumstances of the case. The facts pleaded are, that the mariner quitted the ship, and remained absent for nine or ten consecutive days. These facts, if established, might, I think, constitute a legal desertion, provided an intention absolutely to quit can be inferred from the *res gestæ* of the case. Without such an intention on the part of the mariner, there can be no absolute desertion. If there be an absence from the vessel, *animo revertendi*, whatever be its duration, it would not be a desertion forfeiting the whole of the wages. The offence would fall within the provisions of the 7th section of the statute, which provides special penalties for absence short of actual desertion. I hope that I have made myself clearly intelligible upon this point; that in order to establish a total desertion, there must be proved an intention absolutely to quit the ship; and this intention is to be inferred from the circumstances of the case. The *onus* of proving these facts lies upon the owner, in the present instance, and the task is rendered somewhat more than ordinarily difficult by the consideration that the probabilities of the case are decidedly against him; for it is not likely, as has been observed in the argument, that the mariner, having nearly completed a long foreign voyage, would unnecessarily incur the forfeiture of his hard-earned wages, by a wilful desertion at the last moment, when approaching the final termination of his contract. What, then, is the evidence in support of the charge alleged? And here, in order to do perfect justice to the owner, I will refer, in the first place, to

his own evidence in the cause, \*and will judge him by his [ \* 139 ] own testimony. The owner's evidence consists principally in the depositions of three persons, of the age of nineteen. I will now state the evidence of the first witness, M'Cutchin, and then see how far it is at variance with the other witnesses. In his deposition in chief on the second article, he states that Hulton did go on shore on the afternoon of the 30th of November; that the brig was in a dangerous position when the seaman left her. And, upon the 3d article, he says that neither J. Hulton, James Black, nor T. Thomas, came on board during the 1st of December. In his deposition upon the 4th article, he also swears that Hulton was not on board at all during the 2d of December. Now, in his answer to the 6th interrogatory, he states that on the evening of the brig getting alongside the slip, the master met with an accident, and did not rejoin the brig; and, on the day after, namely, the 2d of December, Hulton came on board, and spoke with the owner. The evidence of this witness, therefore, it is to be observed, is not altogether consistent. The next witness, Mullican, deposes nearly to the same effect, but not quite so; it is rather more in the direct terms of the allegation. In his answer to the 6th interrogatory, he states that Hulton came on board twice; once, several days after the ship had been alongside the slip, and the other time, he believes, on a previous day, but whilst the brig was at the slip. The third witness, M'Kenzie, deposes exactly to the same effect; and the tenor of his evidence, as well as that of the preceding witness, is in support of the allegation. If the case stopped here, I should be inclined to hold that the evidence of these witnesses, although \*it proved nothing as to whether the mari- [ \* 140 ] ner went on shore with permission or not, most clearly established that he was absent from the vessel for several consecutive days, and that, under the circumstances, the *onus probandi* was changed, and that the mariner was bound to show that he had gone ashore and remained absent with permission. But there is other evidence which I must now advert to. Mr. Davidson, the sole owner, has been examined, and I very much doubt whether his evidence ought to be received at all. He is clearly an interested witness, and I cannot see that he can fall under the denomination of a necessary witness, not having been on board the vessel during the voyage. It is, however, unnecessary for me to decide that question, as no objection has been urged against his competency; and, for the sake of examining the whole of the evidence, I will now refer to his testimony. In his deposition in chief upon the 4th article, he says that he came on board early in the morning of the 2d of December, and "he does not recollect" seeing Hulton on board the brig "at any time

*during the said 2d of December.*" And upon the 5th article, he states that neither Hulton nor the other, to his knowledge, came on board until several days after she had been lying alongside the slip. That it must have been on the 7th or 8th of December that he first saw J. Hulton, and that he then told him he had deserted the ship. In his answer to the 6th interrogatory, he further states, that "neither Hulton nor the others, made any offer, or declared themselves willing to return to duty on board the brig, and had either of them made such an offer, he would have accepted it." Such is the [ \*141 ] evidence \*of Mr. Davidson, the sole owner of The Two Sisters; and it is important evidence in this respect, that whilst it corroborated, to a certain extent, the testimony of the preceding witnesses, it also states that he, the owner, construed the absence of the mariner to be a total desertion. Perhaps he was mistaken in his law, and acted towards the seamen upon that supposition. I now come to the evidence of the last witness in support of the defence, a person of the name of Packhorwood, a custom-house officer; and the evidence of this witness differs materially from that of the other witnesses, inasmuch as he represents the mariner to quit the vessel upon the 29th of November, and to return upon the following day, the 30th, and so throughout the whole transaction. I will advert to his deposition upon the 2d article. He says: "I was present in the cabin, when, in the evening of the 29th of November aforesaid, B. D., the master, told Black, the chief mate, that none of the crew were to leave the ship. On the same evening, all the crew, except the boys, went on shore; the second mate was amongst them. They all came on board the following morning, in time for their respective duties. On the said morning, (that is the 30th of November,) I recollect that the master, immediately after breakfast, went ashore. I cannot charge my memory that any of the crew left the brig on that day until about five o'clock in the afternoon, when they all went on shore again." So that, according to this witness, during almost the whole of the 30th of November, these persons were on board. He then further says: "Soon after they had gone, Mr. Davidson, the master, returned on board; he had his [ \*142 ] tea, and went ashore again. The chief mate \*had tea with him and me. After the master had gone ashore, and about seven o'clock of the same evening, J. Black, the chief mate, went ashore: only I and the three boys then remained on board the brig. The brig was then high and dry on the ground, and in no danger at the time." Upon the following article of the plea, he further deposes: "that at about eleven o'clock of the morning of Thursday, the 1st of December, the second mate came up to the master, who was walk-



ing the deck, and asked him for his, the mate's, discharge; but the master replied that he would not give him a discharge, because he had himself taken it," or, in other words, the master told him that he considered his being absent during the night, — twenty-four hours it had not been, — was a total forfeiture of his wages. He then says, "another man, one of the crew, who had on the same morning returned on board, came up to the master, and asked him to settle with him, upon which the master ordered him to his duty. He ordered him to clean the outside of the ship: the man replied, 'he would be —— if he would;' after which the said man went on shore, as did also the second mate. The steward also came on board on the same morning, but, as the others had done, afterwards left the brig. 'I believe that the master refused to receive them on board.'" Although the belief of this witness would not be direct evidence, the fact stated by him affords a sufficient justification for such belief, namely, that the master had already told the mate that he had taken his own discharge.

In his deposition in chief upon the 5th article, this witness speaks nearly to the same effect with regard to the reception which the seamen met \* with from Davidson, the owner, who was [ \* 143 ] in charge of the vessel after the accident had befallen the master. He says, "I cannot be certain as to the exact day, but on one day, and, I believe, the next day after the brig had got alongside the slip, the second mate, and another of the crew, who had left the brig, as aforesaid, came on board, and asked Mr. Davidson, the owner, who was there, to settle with them. He, in reply, said that he had nothing to do with them: he said that they were deserters — he said they had forfeited their wages and clothes." Upon the sixth interrogatory he swears to his belief, that during the six next days following the 1st of December, the mariners came frequently alongside, and sometimes on board the brig, but not that they saw the owner; during all of which time, it is to be remembered, the vessel was in dock, the master disabled, and there is no evidence whatever to show whether the owner, who had come down to Swansea, was permanently on board to attend to any application made by these seamen, or to discharge the duties of master. A second master, it appears, was appointed, but when he took possession is not stated in any part of the case. In addition to the testimony to which I have thus far adverted in support of the defence, there is also the evidence of the log-book, which has been brought in. And supposing I were to consider its contents as admissible evidence in the cause, and entirely to be believed, what would be the effect of it? It would prove this, and nothing more, namely, that Hulton quitted the ship on the 30th

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of November, and remained absent upon the 1st and 2d of December.

As far, therefore, as the evidence of the log-book extends, [ \* 144 ] it would, even if admitted, not \* prove in the slightest degree an abandonment of the ship, clearly showing an intention not to return ; on the contrary, it would clearly bring the case within the 7th section of the statute, which imposes a specific penalty for temporary absence. But the entries which have been pleaded to have been extracted from the log-book, do not, I think, furnish such evidence as could influence the decision of the court in determining the present question, and for the following reasons. In the first place, it is utterly impossible to reconcile the extracts themselves with the evidence of Packhorwood, the custom-house officer, who expressly and distinctly swears that the mariner did return, and was on board the vessel during the morning of the 1st of December. There is also a second objection against their being received as evidence, in the fact that the entries are not made in conformity with the regulations prescribed by the 9th section of the act, which is the only section that applies to a case of total desertion. The provisions of the 9th section require that the circumstances attending the desertion should be entered at the time, and certified by the signature of the master and mate, or other credible witness.

Now there is no signature of the master, and consequently the proof of the alleged desertion, as far as regards the entry in the log-book, under the 9th section of the act, entirely fails in that respect. With regard to the 7th section, again, it is equally difficult to hold that the proof is conformable with the form and regulations prescribed by the statute.

Looking, therefore, at the whole of this evidence, it only [ \* 145 ] proves the following fact, that the mariner \* quitted the vessel without leave, and remained absent two days. This would not be an absolute desertion, but the master construed it to be so, and refused to receive Hutton back, or to give him his discharge. In such a view of the case, and upon such evidence, can I come to the conclusion that there was an entire desertion *sine animo revertendi* ? I am clearly of opinion that I cannot ; and that even in this *ex parte* view of the owner's case, the misconduct of the mariner would fall under the 7th section of the act.

I will now proceed to examine the evidence which has been produced in support of the mariner's demand ; and in so doing, I must observe, that the whole of the direct evidence in support of the summary petition is undoubtedly open to the imputation that it is given under very considerable bias. Two of the witnesses, it has been observed, are in *eodem delicto* with the plaintiff in the suit, and the

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The Hebe. 2 W. Rob.

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third witness is the keeper of a public-house, who looks to the result of this suit for the payment of debts due to him by the party proceeding in the cause. Still, however, the evidence of these witnesses is entirely in unison with the evidence of the custom-house officer, upon a most important and essential point, namely, they all prove a return on board the ship upon the 1st of December; and I must say that, in my judgment, the evidence of these witnesses, supported as it is by that of the owner's witness, Packhorwood, greatly outweighs the evidence of the three boys, who only swear, that they did not see the mariner, Hulton, on board, not that he was not on board. Their evidence only tends to prove a negative, whilst the testimony of the plaintiff's witnesses, on the \*contrary, sup- [ \* 146 ] ported by the testimony of the custom-house officer, directly establishes an affirmative. I am of opinion, therefore, that under the circumstances of the case, I cannot pronounce that the mariner has incurred a total forfeiture of his wages by an absolute desertion in the present instance. I have felt considerable hesitation as to whether I ought not to have mulcted him of a portion of his earnings, under the 7th section of the act, but I have found a difficulty in so doing upon two grounds:

1st. That no reference has been made in the pleadings to any charge of temporary desertion.

2dly. No such charge has been contended for in the argument at the bar.

Under these circumstances, therefore, although I think that in pronouncing for a temporary desertion, I should more nearly meet the truth and justice of the case, I must dismiss the defence of the owner, and pronounce in favor of the claim for the entire wages, and, of course, with the expenses.

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### THE HEBE, Hampton.<sup>1</sup>

June 13, 1843.

Objections of pleading may be taken to any one of the component parts of an act on petition, but objections of this nature should not be taken without substantial reasons to support them.

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<sup>1</sup> [s. c. 4 Notes of Cases, 361.]

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The Hebe. 2 W. Rob.

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A rejoinder, in an act on petition, must not state new matter of defence, unless such matter has come to the knowledge of the party since his answer was given in. But matter subsidiary of the defence contained in the answer may be stated in a rejoinder, when the reply to the answer takes issue upon the matter of defence there stated.

A party cannot lend money upon bottomry of a vessel, if, at the time, he is indebted to the owners in respect of the vessel.

THIS was a question as to the admissibility of a rejoinder in a cause of bottomry. An act on petition, an answer, and a reply had been given in and admitted in the cause. The rejoinder to the reply was now opposed by

*Haggard and Harding*, for the bondholder.

*Addams and Robinson*, *contra*.

[ \* 147 ] The substance of the various pleas, and of the \* objections in the judgment, are fully noticed by the court.

PER CURIAM.

In proceeding to consider the objections which have been taken to the admission of this plea, I would, in the first instance, observe that, although under the authority of the decision of Lord Stowell,<sup>1</sup> in the case of *The Ville de Varsovie*, it is clearly competent to the parties in a suit to take objections of this kind, yet these objections should not be raised without grave and substantial reasons in support of them. Cases may unquestionably occur, like the case decided by Lord Stowell, in which it may be right and proper to bring them before the court, especially where the preliminary discussion might prevent the introduction of much irrelevant matter, which, if admitted, would lead to the accumulation of unnecessary evidence. Where, however, no such consequence is likely to result from the admission of the plea, the court will be disposed to discontinue the discussion, as tending to defeat the objects for which the summary form of proceeding was introduced into the practice of the court, namely, expedition, and the avoidance of expense to the suitors.

Having thrown out this observation, I will now direct my attention more immediately to the objections which have been offered to the admission of the present rejoinder. It has been objected, in the first place, that the rejoinder does not contain matter proper to be put in issue originally in the cause. It has also been objected, that if the

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<sup>1</sup> Unreported on this point. [See *The Anne & Jane*, 2 W. Rob. 98.]

matter might rightly have been pleaded in the first instance, 'it is now offered at too late a period of the proceedings. [ \* 148 ] These objections have been supported by the argument, that great inconvenience and delay must be caused by the necessity that the objecting party must have to send to Sydney for fresh information to meet and answer what is alleged to be new matter in the cause. It is clear that, in order to give a satisfactory opinion upon these points, I must look to the contents of the several pleas, because I must determine the question with reference to the case, as stated by the respective parties to the suit.

Now the first proceeding in the case was an act on petition brought in on behalf of the bondholder. It was in the ordinary and common form, simply containing the usual averments which are necessary to support a bond in this court. Let me next look to the answer to this first plea.

The answer states circumstances generally connected with the voyages and employment of this vessel; her proceeding to Sydney from this country; her arrival there in 1839; her going to Manilla and back under charter; and the persons advancing money on bottomry, and now suing by their assignee or agent in this country. It further sets forth that, in consequence of the owners of the vessel, who are resident in Scotland, being dissatisfied with the conduct of the then master, Malcolm, they sent out a joint power of attorney to Messrs. Brown, at Sydney, authorizing them, amongst other things, to remove Malcolm, and appoint some other master in his place. All these facts are important, as bearing upon other parts of the averments. The answer, then, further alleges that at the time when the power of attorney was received by Messrs. \* Brown, or soon after, [ \* 149 ] Messrs. Dunlop, the charterers of the vessel on her last voyage, (not stating, however, what that last voyage was,) were indebted to the owners of the vessel for freight previously earned. This, in my opinion, is a most important, and, indeed, a leading averment in the defence, because it distinctly alleges that Messrs. Dunlop were indebted to the vessel at the time they advanced money for the use of the ship on bottomry. If any advances were necessary, and if at the time the advances were made on bottomry by Messrs. Dunlop, they were debtors to the ship, surely they were bound first to discharge the debt, and if they had money in hand to advance on bottomry, they were clearly able to have done so, in which case there would have been no necessity for the bond. It is further alleged in the answer, that Messrs. Dunlop had been informed that Messrs. Brown were authorized to receive the money; that Hampton was appointed master of the vessel in the place of Malcolm; and that,

under the advice of Messrs. Brown, advertisements were issued for the purpose of obtaining money on bottomry; that Messrs. Dunlop offered to lend the money, and their offer was accepted.

The remainder of the answer impeaches the general validity of the bond upon somewhat different grounds, by denying the fact that the money was *bonâ fide* advanced, and alleging that, instead of paying certain tradesmen's bills, as they had undertaken to do, and to furnish the master with proper vouchers for the payment, Messrs. Dunlop had handed over receipts, signed not by those tradesmen, but by their (Messrs. Dunlop's) own clerk.

In substance, therefore, two grounds of defence are stated [ \* 150 ] in this answer by way of invalidating the \* bond. The one is, that Messrs. Dunlop were debtors to the vessel when the money was advanced; the other, that they did not *bonâ fide* advance the money; that is, did not make the pretended payments on behalf of the ship.

In order to make clear the observations which I may hereafter have to make, I think it is absolutely necessary that I should here state the opinion which I entertain upon these two averments of the defence. I am of opinion, that these averments are fit and proper to be made; for I deem it to be an undeniable axiom of law, that no person is entitled to make advances on bottomry, who, at the time of making them, is a debtor to the vessel on whose account the advances are made. I am well aware of the great difficulty which the court will have to encounter in unravelling the present transaction, both from the length of time which has elapsed, and from the multiplicity of the accounts. This difficulty is materially increased, in the present case, by the consideration that the whole of the circumstances have taken place in so distant a part of the world. Looking, however, to the averments in question, it is perfectly evident that according to the whole doctrine of the court on the subject of bottomry transactions, the court cannot eventually sustain this bond, if it should finally turn out that Messrs. Dunlop, at the time when they advanced the money, were debtors to the vessel, or to the parties owning her. The whole foundation of these bonds is, that the master has no funds or credit to raise funds for the purpose of extricating the vessel from her difficulties; and it cannot be truly said that he has no funds, when there is a person on the spot where the necessity arises who [ \* 151 ] is in debt to the vessel or her \* owners, and who is competent and liable to pay that debt. It has been intimated that the matters in question are beyond the means of this court's investigation; at all events, they are not beyond its jurisdiction, for they are subjects with which the court is in the constant habit of dealing.

I have thought it expedient to make these observations upon the two averments, upon which the defence is mainly rested, in the answer, and I must here remark, that the original defence is not framed precisely as I could wish. I think it should have been more precisely stated, in the first instance, how and to what amount Messrs. Dunlop were debtors to the vessel. I will now advert to what has been stated in the reply. It alleges that, at the time when Hampton was appointed master, the vessel was extremely deficient in stores and provisions, and large arrears were due to the seamen for wages, as well as to various tradesmen who had supplied stores and necessaries, who might have arrested the vessel, and, if necessary, might have sold her for the payment of their debts. The reply then proceeds to deny that Messrs. Brown were not the general agents of the owners; and it further alleges that, prior to the removal of Malcolm from the command of the vessel, Messrs. Dunlop had paid to him the whole amount of freight due from them to the vessel, as charterers thereof, and that they were not indebted to the vessel or the owners at or for some time prior to the advancement on bottomry of the loan which had been advertised for. This latter averment is most important, as furnishing a direct reply to the defence of the owners; for the answer of the owners says, Messrs. Dunlop were indebted at the time to the vessel. \*The reply con- [ \*152 ] cludes with some subsidiary statements respecting the bills and the receipts, and a denial that Messrs. Dunlop were informed that Messrs. Brown were authorized to receive from them the payment of the money in which they were indebted to the ship as charterers. Having stated thus far the whole of the previous proceedings in this cause, I have now to consider what are the contents of the rejoinder, respecting which the present discussion arises. In approaching this consideration, it may be expedient that I should briefly state the principles which are applicable to a plea of this description.

Now, I apprehend that no absolutely new matter, that is, matter of a separate and distinct character from that which is alleged in the answer, ought to be pleaded in a rejoinder, unless, indeed, such new matter has come to the knowledge of the party pleading for the first time since the original answer was given in.

Subsidiary matter, in support of the original defence, may be alleged under a great variety of circumstances; for instance, when issue is taken in the original defence, and averments are made in support of that issue which require to be contradicted or explained; in such a case there is no other mode in which they can be answered, save in a rejoinder. How far do the contents of this rejoinder fall within this principle? The rejoinder sets out by denying that Messrs.



Dunlop were not in any manner indebted to the vessel at or prior to the time when the pretended advances on bottomry were made. This, it is true, is *prima facie* a repetition of the original averment in the answer; but at the same time it is also a denial of what [ \*153 ] is contained in the reply. It then goes on to support this denial, by particularizing the transactions in which the Messrs. Dunlop were engaged, as the charterers of the ship, alleging that on the return of the vessel to Sydney from Manilla, with a cargo of sugar, in the latter part of the year 1839, she was a second time chartered by Messrs. Dunlop to proceed thence to Batavia and Java, at the rate of 220*l.*, per month, whereby Messrs. D. became indebted to the vessel, or to her owners, in the sum of 1,800*l.*, and upwards. I am of opinion, that it is perfectly competent to the owners to plead these averments, and for the following reasons: that it was not incumbent upon the owners, in writing to the act on petition, in the first instance, to state in their answer matter subsidiary to the general averment, that Messrs. Dunlop were indebted to them at the time the bottomry advances were made. It would, indeed, be most inconvenient to the court, in proceedings of this kind, to enter into the details of such subsidiary matter in the answer, when the reply of the party proceeding might possibly admit the truth of the general averment, and allege that, notwithstanding such admission, the law was in their favor. Undoubtedly, in the answer, the principal ground of defence upon which the respondent relies, should be clearly stated; but matters merely subsidiary to what forms that defence, will more properly be introduced in the rejoinder. How then does this doctrine apply to this rejoinder? The reply sets forth, that Messrs. Dunlop were not indebted to the owners of The Hebe; and facts and reasons are stated to show that they were not so indebted. Surely, then, it is not only competent, but absolutely necessary, that the [ \*154 ] owners should state, in the present plea, the important facts which they have alleged, to support their original averment. The rejoinder next proceeds to state that the power of attorney, authorizing Messrs. Brown to displace Malcolm from the command of the ship, was received by Brown and Co., at Sydney, before the said brig's return from her voyage to Java, and that if Messrs. Dunlop really paid any portion of the freight due by them on account of the said voyage, to the said Malcolm, it was after the brig's return, and when they well knew that the said Brown and Co. had become the authorized agents of the owners, and were invested with a special authority to displace Malcolm, the former master. This, I think, is an admissible averment, as meeting the statement distinctly set up in the reply, that, in the payment of the debt as charterers, they had,

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The Sociedade Feliz. 2 W. Rob.

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prior to the removal of Malcolm, paid to him the whole amount of the freight due from them to the said brig. With respect to the remaining averment, that in the month of February, 1840, prior to the ship's return from Java, James Turner, brother of one of the owners of the ship, who was then at Sydney, at the instance of the owners, had an interview with Messrs. Dunlop, and then cautioned Messrs. Dunlop not to make any further advances to Malcolm, the then master. I think this averment is also entitled to be admitted as corroborative of the former averment, that Messrs. Dunlop were forewarned against making any further payment to the master. Upon the whole, then, I think that the rejoinder is entitled to be admitted. I am well aware that an increase of expense and delay may ensue from this further investigation, but it is abundantly clear that the \* party has a perfect right to make good his defence [ \*155 ] by these averments, and that they are necessary and called for by the reply.

*Haggard.* My party must have time to answer these matters.

PER CURIAM.

If I am furnished with an affidavit that, for the purposes of justice, it is necessary to answer them, I will allow time.

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THE SOCIEDADE FELIZ, Joao de Souza Campos.<sup>1</sup>

June 13, 1843.

Cases of claims to joint capture of slave vessels are to be governed by the principles established in the Prize Court of Admiralty with respect to claims to joint capture in time of war; subject, however, to such exceptions as the distinction between the respective cases may create; (*exempli gratia*,) where, in the former instance, a claim to joint capture is supported solely by the evidence of releasing witnesses.<sup>2</sup>

Principles as to what will constitute association between ships of war. An order was given by a superior to an inferior officer, by which the latter was prevented joining with his vessel in the chase of a slave ship, which was afterwards captured by the vessel of the former. Held, that a claim to joint capture was sustainable.

A claim to joint capture founded on a slave ship being captured by one vessel in sight of the claimant vessel.

THE facts of this case have been already reported,<sup>3</sup> and the ques-

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<sup>1</sup> [S. C. 2 Notes of Cases, 430.]

<sup>2</sup> [For cases as to joint captures, see *The Nordstern*, 1 Acton, 127.]

<sup>3</sup> *Ante*, vol. i. 303.

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The Sociedade Feliz. 2 W. Rob.

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tion, which was a claim to share in the capture of a Brazilian slave ship, condemned by the Mixed Commission Court at Sierra Leone, was now argued upon the merits.

In support of the claim, *Addams* and *Robertson* submitted — That the evidence in the cause fully and satisfactorily established, that when the prize was first seen, and *The Harlequin* was about to give chase, *The Forester* was signalled from that vessel to remain behind and pick up *The Harlequin's* boats. That this signal was admitted by Lord F. Russell, the commanding officer of *The Harlequin*, to have been made by his directions; and all opportunity of actual coöperation in the chase was thus taken away from *The Forester*, by the order which Lieutenant Bond was bound to obey. That [ \*156 ] in obeying that order, and picking up the boats, as \* directed, the officers and crew of *The Forester* rendered a virtual assistance to *The Harlequin*, and, in expediting the movements of that vessel, which would otherwise have been delayed, greatly facilitated the speedy capture of the prize. That it was not disputed that *The Forester* was actually in sight of the prize at the commencement of the chase; and although there was no direct evidence to show that she was seen from the prize at the time the capture was made, this fact was fairly to be inferred under the circumstances of the case, the chase having been confined to the distance of only nine or ten miles from the place where the prize was first descried. Lastly, that *The Forester* was both able and willing to have joined in the chase, had she not been prevented by the order in question; and being a ship of war expressly fitted out and employed for the purpose of capturing vessels engaged in the slave trade, the *animus capiendi* in regard to the condemned slave ship was to be presumed. That under the circumstances of the case, therefore, *The Forester* was entitled to share as joint captor; and it would be a great hardship upon the officers and crew of that vessel, that they should be deprived of their title by their obedience to the commands of Lord F. Russell.

*Queen's Advocate* and *Bayford*, *contra*. That there was no proof of that association and active coöperation on the part of *The Forester*, which would entitle that vessel to share as joint captor; that, under the principles laid down in the case of *The Aviso*, questions of this kind were to be governed by the same rules as were adopted in cases of prize capture in time of war; and by those rules it was [ \*157 ] requisite that there should be an \* actual coöperation in the capture, or at least a constructive assistance by intimidating the prize, in order to entitle a vessel to share as joint captor; that

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whatever might be the hardship upon *The Forester* that she was prevented from joining in the chase by the order to pick up *The Harlequin's* boats, the obedience of Lieutenant Bond to this order would not entitle *The Forester* to share upon this consideration alone, under the authority of *The Financier*; <sup>1</sup> that, in delivering his judgment in that case, Lord Stowell said: — “It may, perhaps, be a hardship that this vessel should lose the benefit of joining in the prize, in consequence of the orders she received to pick up the boats of another ship, by which service she was delayed. The answer which must be given to those who entertain such an opinion is, that it is the first duty of the king's officers to obey the lawful commands of their superiors, and that views of mere private advantage are of secondary consideration only, and must give way to the imperative requisitions of the public service;” that the circumstances of the two cases were analogous, and this *dictum* and final decision of Lord Stowell forcibly applied in the present case; that, with respect to the *animus capiendi* on the part of *The Forester*, the presumption was, that there was no such intention on the part of that vessel; and this was clearly shown by the declaration of Lieutenant Bond himself at the time, — “That the vessel descried was not a slaver, and not a prize.” Lastly, that the only evidence in support of *The Forester's* claim was the testimony of releasing witnesses; and it had been laid down in former cases, that such evidence was insufficient to sustain a claim of joint capture. The learned counsel, in support of the arguments, cited the cases of *The* [ \* 158 ] *Fadrelandet*, 5 C. Rob. 120; *Drie Gebroeders*, 5 C. Rob. 339; *The Union*, 1 Dodson, 346; *The Nordstern*, Acton, 128.

*Addams* and *Robertson*, in reply. That the fair inference to be drawn from the evidence upon the facts of the case was, that *The Forester* was seen from the prize at the time of the chase, and, if so, intimidation was to be presumed, and that would be sufficient to entitle *The Forester* to share, under the principles adopted in cases of capture in time of war; that it frequently happened, during the war, that a prize was taken by a vessel of one squadron, in the presence of another ship, attached to an entirely different squadron, and under a totally different command; yet, provided an intimidation upon the prize was effected by the presence of such ship, the claims of the officers and crew to share, as joint captors, had been over and over again allowed, although no direct association existed between

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<sup>1</sup> [1 Dod. 61.]

the two vessels. With respect to the argument, that the commanding officer of The Forester had abandoned the *animus capiendi*, the evidence in support of this assertion was inferential only, being derived from the opinion expressed by Lieutenant Bond, that the chase was not a slaver; and such an opinion, even if expressed, was no proof that he would not, if required, have coöperated in the chase and capture in question, more especially under the circumstances of the case, when the contrary is expressly averred upon oath by the several witnesses who have been examined in support of The Forester's claim.

Lastly, that with regard to the objection that the claim [ \* 159 ] \* of The Forester rested entirely upon the evidence of releasing witnesses, the objection was sufficiently answered by the reasoning and the decision of Lord Stowell, in the case of The Galen.<sup>1</sup>

#### JUDGMENT — 2d August.

DR. LUSHINGTON. This vessel was condemned by the British and Brazilian Mixed Commission Court, at Sierra Leone, as engaged in the slave trade, and a claim is now set up on behalf of her Majesty's brig Forester to share with The Harlequin, the actual captor, in a moiety of the proceeds, and also in the bounty which is given by act of parliament. When the question was brought under the consideration of the court, in the first instance, I expressed my concurrence in the principle laid down by Lord Stowell, in the case of The Aviso,<sup>2</sup> that the rules which governed cases of joint capture in the time of war should be applied to questions of this description. Upon further reflection, I feel no disposition to depart from that opinion. At the same time, I am inclined to think, and so, I conceive, was Lord Stowell, in delivering his judgment in the case of The Aviso,<sup>2</sup> that in questions of slave capture, cases may arise, which could not be rigidly and strictly governed by the same rules which are applicable to joint capture in time of war. Between the two descriptions of cases, essential distinctions will occasionally be found, which must preclude the application of the same identical rules. For example, in many instances of slave capture it would, I conceive, be productive of much positive injustice to enforce the application of the rule, that a claim to share as joint captor should not be supported by the evidence of releasing witnesses alone.

<sup>1</sup> [2 Dod. 19.]

<sup>2</sup> [2 Hagg. Ad. R. 31.]

\* What is the foundation of the rule in question? It is [ \* 160 ] this: that, in all ordinary cases of prize capture, unexceptionable testimony may be procured *aliunde*, namely, the evidence of the persons on board the captured vessel. In cases of slave capture, when the condemnation takes place before the Mixed Commission Court, it is obvious that such evidence, in a great majority of instances, could not be possibly obtained. The present case, it appears to me, is a case of this description; and, for this reason, I cannot feel justified in sustaining the argument which has been pressed by the counsel for the actual captor, that the claim of *The Forester* must altogether fail, because there is no evidence in its support but that of releasing witnesses. I do not feel that the reasoning, upon which this opinion is founded, requires any authority to sustain it; it is founded upon a natural principle of equity and justice. That, in order to establish a legal claim, such proof cannot be legally required, as a *sine qua non*, which, according to the ordinary rules of probability, cannot be produced. If it were necessary to cite authorities to confirm this position, the case of *The Galen*, which was adverted to in the argument, would, I apprehend, supply a sufficient confirmation. I do not see any material difference between that case and the present case; for although the case of *The Galen* was an ordinary prize transaction, the rules and principles of evidence, which were adopted in that case, may be equally applied in the present instance.

I will now advert to another consideration in this case, which has a material and important bearing upon the claim which has been set up on behalf of *The Forester*, namely, whether or not there was, upon \* the present occasion, any association between [ \* 161 ] *The Forester* and *The Harlequin*; and, if there was any such association, what was its description and extent? I greatly regret that the case is left so entirely bare of evidence upon this important particular. In the case of *The Aviso*, which has been referred to, Lord Stowell, I find, held, and that without doubt or hesitation, that where vessels were united together for the suppression of the illegal traffic in slaves, such union was an association, in the legal construction of that phrase. The distinction between this case and *The Aviso* I presume to be, (for, under existing circumstances, it is little more than a guess,) that, in the latter case, one of the vessels, *The Bann*, had received special orders from the Admiralty to put herself under the command of *The Maidstone*. In the present case, it does not appear from the evidence before the court that any such directions were given. Both vessels, *The Harlequin* and *The Forester*, it appears, were furnished with special



orders from the admiralty to suppress the illicit traffic in slaves; but beyond this, as the case is laid before the court, no further directions seem to have been given. It has, indeed, been stated that Lord Francis Russell was the senior commanding officer of the Sierra Leone division of the squadron on the western coast of Africa. But the most important point has been left entirely unnoticed, namely, whether, as senior officer on the station, Lord Francis Russell had or had not the general control and superintendence of the movements of *The Forester*, and whether she acted under his orders or not. Had such an union been proved by evidence, I should have held that it fell within the legal definition of association laid down by Lord Stowell, in his observations in the case of *The Aviso*; and such an association would have materially strengthened the claim of *The Forester* upon the present occasion.

Looking to the evidence in the cause, I regret to say that no such union or association is established; and, in the absence of legal proof to that effect, I cannot assume it. I dwell more particularly upon this point, because, according to my own knowledge of the proceedings upon the coast of Africa, the contrary is the most probable.

In determining this case, therefore, I must, whether the fact be so or not, consider that the two vessels were acting independently of each other, although both having the same object in view, but not associated for the common purpose; that, meeting accidentally, the senior officer would have the right to give orders in any incidental transaction in which the two vessels might be engaged together, but that he would possess no authority over the general conduct of *The Forester*. Upon this basis, then, I will now proceed to the further examination of the facts of the case. The two vessels, it appears, were lying together off Cape Palmas. The captured vessel was descried by both, and *The Harlequin* went in chase, but *The Forester* did not. So far, the facts of the case are undisputed. The question here arises, if any, and what orders, were given by Lord Francis Russell to Lieutenant Bond, who had the command of *The Forester*. Upon this point there is a very great conflict of evidence. On the part of *The Forester*, it is alleged that orders were issued to her to remain at anchor until *The Harlequin* returned.

[ \*163 ] \* This statement is denied on the part of *The Harlequin*; but Lord Francis Russell, it is to be observed, himself admits that he ordered *The Forester* to remain and pick up his boats. This order, which *The Forester* was bound to obey, and which she did obey, in my opinion is a most important ingredient in

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The Sociedade Feliz. 2 W. Rob.

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the case. What is the legal effect of such an order? Is it not a rendering assistance to The Harlequin towards the capture of the slaver? Could The Harlequin have gone in chase if The Forester had not been there, — at least until she had picked up her boats? I have but little hesitation in coming to the conclusion that she could not. If the fact be so, the practical effect of The Forester's obedience to the order in question was to accelerate the operations of The Harlequin, and, consequently, to contribute some assistance towards the speedy chasing and final capture of the prize. The order so given by Lord Francis Russell was not alien from the object which he had in view, namely, the capture of the vessel which was descried. On the contrary, the order was directly auxiliary, and the performance of the order was coöperative to the attainment of the object proposed. The present is, in this respect, widely distinguishable from the case of a superior officer giving orders for a separate and distinct service, necessarily removing the ship from the scene of operation.

Now, if to the circumstance to which I have just adverted, there should be added proof of sight at the time of the capture, and the possibility of The Forester's joining in the chase and capture, unless prevented by the order of Lord Francis Russell, I am clearly of opinion that these facts, \*taken together, would consti- [\*164] tute a sufficient claim to entitle The Forester to share in the money to be distributed.

With respect to the question of sight, the important point always is whether the captured vessel saw or could see the vessel claiming to share; and this point, in the absence of direct testimony from on board the captured vessel, must of necessity be made out by inference. In the present instance, there is, I think, no reasonable ground to doubt that The Sociedade Feliz saw The Forester in the morning of the day on which the capture was effected. Mr. Marriott, a witness on behalf of Lord Francis Russell, and of The Harlequin, states that even at the time of the capture, after a chase varying in duration (according to the different statements) from one hour and a half to two hours and a half, the distance between The Sociedade Feliz and The Forester was only from eight to ten miles. That The Forester saw The Sociedade Feliz is beyond all dispute; and although, from circumstances stated in the evidence, there might have been greater difficulty in The Sociedade Feliz seeing The Forester at the time of the capture, there is, I conceive, sufficient reason to conclude that The Forester might have been seen; and I am disposed to hold that this would be sufficient where sight, at an earlier period, is established.

It is not, I apprehend, absolutely necessary, under the circumstances here stated, that sight, at the actual time of the capture, should be proved. I am inclined to think that such proof is unnecessary where detention in the service of the actual captor is completely established, as it is in the present instance.

[ \* 165 ] It has, however, been contended in argument, as \* another ground of objection to The Forester's claim, that The Forester, from her disabled condition, and the sickly state of her crew, could not have prosecuted the chase, even if her commander had desired it. Looking to the evidence before me, I do not think that this averment is borne out in proof. On the contrary, in my judgment, the result of the evidence tends to show that that vessel was lying at single anchor at the time; and although some of her crew might be sick, she had on board a sufficient number of healthy persons to have enabled her to make sail, and to have effected this capture, if it had been necessary for her to proceed in chase, and if she had not been kept back by the orders of Lord Francis Russell, to which I have adverted. I must now briefly refer to the last remaining point which has been urged by the counsel for The Harlequin, namely, the asserted declaration of Lieutenant Bond, that the vessel descried was not a slave ship, and not a prize. This declaration, it has been contended, clearly shows that the commander of The Forester had no intention to chase, and that the absence of such intention on his part is fatal to the claim of joint capture which has been set up. Now, assuming the declaration to have been made as stated, I am of opinion that such a declaration, made under the circumstances of the case, after the order had been received to pick up the boats, could not produce the effect which is ascribed to it. The expression of such an opinion does not necessarily show an absence of an *animus capiendi*; and it certainly adds nothing to the admitted fact that The Forester did not join in the chase, the effect of which fact I have already taken into my consideration.

[ \* 166 ] \* In the investigation of the transaction under consideration, I have not attempted to reconcile the discrepancy in the evidence upon this part of the transaction, and upon other matters. It is unnecessary that I should do so; and I gladly forbear from taking upon myself a task which I should despair to accomplish satisfactorily. My judgment will be founded upon the facts which I consider to be established by the evidence on both sides. Looking at these facts, I hold that The Forester is entitled to share. I am most desirous that it should be distinctly understood, that my decision is founded upon the union and combination of all the circumstances of the case, and not upon the one or the other of them singly.

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The Betsey. 2 W. Rob.

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I am also further desirous that it should be understood that, in forming my decision, I have not ventured to pronounce any opinion upon one point which has been raised in the argument, namely, that *The Forester* was bound not to chase without an order from the senior officer on the station; and that having remained at anchor, as it were, by compulsion, in consequence of no such order having been given, she was upon this account entitled to share. This is an important point, which I am not called upon to determine upon the present occasion, and I, therefore, leave it untouched, as a point which may be fully open to discussion upon any future occasion.

For the reasons which I have stated, I am of opinion that *The Forester* is entitled to share in the proceeds of this capture; and as the question which has been raised was a question requiring a very deliberate consideration, I think the expenses on both sides should be paid out of the proceeds.

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\* THE BETSEY, Thompson.<sup>1</sup>

[ \* 167 ]

July 20, 1843.

Agreement made, by the master of a steam tug, to tow a damaged vessel from the Queen's Channel up to London for 50*l*.

Attempt made by the master and crew of the steam tug to convert the service into a salvage service, upon the plea that the original agreement had been cancelled by consent; also that circumstances had subsequently occurred which rendered the agreement no longer binding.

Claim of the salvors overruled, and the sum of 50*l*., which had been tendered in act of court, pronounced for.

THIS was a cause of salvage, promoted by the owners and crew of the steam vessel *Copeland*, for services rendered to the above ship, under the following circumstances. The steam vessel *Copeland*, it was stated in the act on petition, was, on the evening of the 15th of January last, nearly opposite Margate, making for the Foreland, in order to take shelter under it during the night, when, about half-past three, P. M., the wind blowing a smart breeze from the W., she descried a brig riding at anchor in the Queen's Channel, at the distance of three or four miles, with her ensign hoisted as a signal for

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<sup>1</sup> [S. C. 2 Notes of Cases, 409.]

assistance. The master of The Copeland, having steered towards her, found her to be The Betsey, the vessel proceeded against; and on going alongside, he was informed by the persons on board that, in consequence of having been exposed to violent gales, she was in a leaky condition, with her sails torn and very much damaged, and that her crew were in an exhausted state. An agreement was made by the master of The Copeland to tow her to London at daylight on the following morning, for the sum of 50*l.*; and The Copeland then left her, and ran under Broadstairs for the night. About five, A. M., of the following morning, The Copeland got under weigh, and ran out towards The Betsey; but the wind, which had increased during the night, blowing hard, accompanied with thick snow, the brig was not discovered until daybreak, when the steamer immediately went alongside, and found that during the night she had [ \* 168 ] been compelled to drop her second \* anchor. It being found impossible to get up both her anchors, the crew of The Betsey slipped one, and in order to save the other, the crew of The Copeland passed a new eight-inch hawser on board the brig, which had none sufficiently strong for the purpose, and immediately began to tow ahead.

At this time a large East Indiaman, which was lying at anchor higher up the river, hoisted a signal to The Copeland for assistance; but as the brig could not dispense with her services, the signal was not attended to. After towing ahead for about half an hour, the anchor of The Betsey was with difficulty raised, and as the weather threatened to become worse, and the brig's bows were at the time frequently under water, the master of The Copeland advised the master of The Betsey to run into Ramsgate Harbor for shelter; but the said master expressing his desire to proceed, The Copeland continued to tow the brig. The act on petition then further set forth in detail the danger of the brig, and the difficulties encountered by the steamer in performing the service towards The Betsey. That in consequence of the storminess of the weather they were obliged to put into Ramsgate Harbor, where The Copeland was detained in the service of the salvors during a whole night.

The main facts of the case, as stated by the salvors, were not denied in the answer of the owners. They made a tender of 50*l.* in acts of court, and their defence was simply rested upon the sufficiency of the tender so made, it being the sum originally agreed upon with the master of The Copeland.

The reply of The Copeland, in answer to the alleged agreement, stated, that when The Copeland approached within hail of [ \* 169 ] the brig, on the morning \* of the 16th, Murray, the master

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The Betsey. 2 W. Rob.

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of the steamer, hailed the master of the brig, and informed him that it was as much as the steamer could do, in the existing state of the weather, to take care of herself, and advised him to slip and run for shelter to Ramsgate. That upon the master of the brig then urging him to fulfil his contract, the said J. M. replied he could not, and would not, undertake it according to the agreement of the preceding evening, namely, 50*l*. That the master of the brig then proposed that the agreement should be cancelled, and that The Copeland should endeavor to take The Betsey either to London or to some place of safety.

The whole of this averment was denied in a rejoinder. The value of the ship, cargo, and freight, was 2,893*l*.

#### JUDGMENT.

DR. LUSHINGTON. In this case, the plea in the original act on petition is confined to a claim for salvage, in which the promoters of the suit allege that they have discharged their duty to the vessel, and that the tender of 50*l*., which has been offered, is an insufficient remuneration. The case, therefore, in the first instance, assumes the shape of a mere question as to the *quantum meruit* of the party who has performed the service. When, however, it comes to be more narrowly examined, other questions arise of a very different complexion. It is stated on behalf of the salvors, in the original act on petition, that upon the 15th of January last they discovered The Betsey riding at anchor in the Queen's Channel, with her ensign hoisted as a signal for assistance; and that upon coming up to the brig, they  
\* were informed that she had been exposed to considerable [ \*170 ] difficulties from stress of weather, and that she was in a leaky condition, and her sails were much damaged. It is also further stated that an agreement was made with the master of The Betsey, that The Copeland should, at daylight on the following morning, tow the vessel up to London for 50*l*. This agreement having been made, The Copeland, it appears, left The Betsey, and ran under Broadstairs for the night, the weather at the time being, it is evident, by no means calm, although not boisterous; because it is expressly alleged, in the act on petition, that at the time the salvors first saw The Betsey, they were making for the Foreland, in order to take shelter under it during the night. Upon this statement an observation was made by the Queen's Advocate, which is, I think, perfectly well founded, namely, that the agreement in question, whatever it might have been in the first instance, was obviously made by the salvors with an adequate knowledge of all the circumstances relating to the previous state and condition of the vessel requiring their assistance.



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The Betsey. 2 W. Rob.

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Now the fact of the agreement being admitted, such agreement would be legally conclusive upon the claim at issue in this cause, unless it has been rescinded by operation of law, or by the mutual consent of the contracting parties.<sup>1</sup> The *onus probandi* rests with the owners of The Copeland, in the present instance, and they have endeavored to discharge themselves of this obligation in two ways. In the first place, it has been alleged that the agreement was cancelled by mutual consent; and secondly, that circumstances subsequently occurred which rendered the agreement no longer obligatory [ \*171 ] and binding upon \*them. Looking to the pleadings in the cause, I do not find any mention in the original act on petition, that the agreement in question was cancelled by consent of parties, or in any other manner, although it is so stated in the reply, and in the latter part of the affidavit of Murray, the master of The Copeland, it is sworn to this effect. He deposes, that when he commenced towing The Betsey up the river, on the 16th of January, he distinctly informed the master that he did not then consider himself bound by the agreement to perform the service for 50*l.*, and that the master of The Betsey thereupon entreated him not to leave him, at the same time saying that they would hereafter agree what sum should be paid for the services of The Copeland. The affidavit of this witness then further sets forth, that the master of The Betsey frequently declared, in the presence of deponent and of others, that he did not consider the agreement as binding upon the deponent; and that had it not been for the services of The Copeland, The Betsey would inevitably have been lost.

How then does the matter stand upon this first point in the case? With regard to the asserted cancellation, it is distinctly pleaded in the reply of the owners of The Copeland, and as distinctly denied by the owners of The Betsey in their rejoinder. There is also the affidavit of the master of The Copeland on the one hand, who swears that the agreement was cancelled by consent; on the other hand, there is an affidavit of the master of The Betsey directly supporting the denial.

No other evidence is before the court to corroborate the respective averments upon the one side or the other. [ \*172 ] \*In this conflict of evidence upon this point, I am bound to hold, that the cancellation of the agreement by consent of parties, is not sufficiently made out; and this upon the principle that whoever takes upon himself to establish the fact that an admitted agreement has been invalidated by consent of parties, is bound to prove, by clear

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<sup>1</sup> [The True Blue, 2 W. Rob. 176.]

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The Betsey. 2 W. Rob.

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preponderance of testimony, that it was so cancelled; and this has not been done in the present instance.

I now come to the second point in the case which is set up by the owners of *The Copeland*, namely, that the agreement, in consequence of inevitable circumstances, has been defeated, or, in other words, that the state of circumstances was subsequently so far altered as to render the service no longer a towage, but a salvage service. In support of this proposition, the case of *The William Brand*<sup>1</sup> has been cited. (The learned judge here referred to the circumstances of the case cited, and proceeded to observe)—The consideration then is, whether the circumstances of this case bring it within the terms of the principle which I laid down in deciding the case of *The William Brandt*? I am of opinion that they do not, and that there is a material distinction between the two cases, inasmuch that in the case cited the steamer was in the actual performance and discharge of the agreement itself, when, in consequence of the weather, and without any blame attaching to the steamer, the vessel got upon the sand, and so became exposed to the dangers which rendered the extra exertions of the steamer necessary for her safety. In the present case, the averment is, that the agreement was cancelled in the very commencement of the service, and that the \*transaction [ \*173 ] throughout was a salvage transaction, the remuneration of which was to be settled afterwards.

This circumstance, it appears to me, creates a grave distinction between the two cases, because the owners of *The Copeland* cannot say, on the present occasion, "We were honestly, fairly, and skilfully discharging an agreement already made, and circumstances which we could not foresee altered that agreement." Considering, then, the agreement a subsisting agreement, not cancelled by consent of parties, what were the circumstances which subsequently occurred? and how far were these circumstances such as neither party could reasonably be expected to foresee, and which consequently could not be fairly supposed to have been in their contemplation at the time they made the agreement? Did any thing occur during the night, or upon the following morning, to engraft an alteration of circumstances upon the original agreement? The evidence in the cause does not enable me to arrive at any such conclusion. It may be true, as stated, that the violence of the wind increased upon the morning of the 16th; but looking to the season of the year when the transaction took place, remembering, too, that the wind at the time was blowing a smart

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<sup>1</sup> [2 Notes of Cases, (Supplement,) p. 67.]

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The Nicolina. 2 W. Rob.

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breeze from the west, such an occurrence must, I conceive, have been within the contemplation of the contracting parties when the agreement was made upon the preceding evening. Another fact has been stated by the salvors, which is in some degree contradicted, namely, that after the departure of The Copeland, upon the evening of the 15th, the master of The Betsey, in consequence of the [ \* 174 ] increasing roughness of the weather, was \* compelled to let go a second anchor. Now, whether the second anchor was so dropped in the afternoon of the 15th, and prior to the arrival of The Copeland, as stated in The Betsey's protest, or during the night, according to the statement of the salvors, the fact itself can have no material bearing upon the issue in the cause, and most unquestionably cannot be considered as in any degree shaking the obligation of the agreement, or as entitling the salvors to a higher remuneration. It was properly observed in the argument, by the counsel for The Betsey, that the agreement in question was not for an ordinary towage service, and that the reward was upon a higher scale of remuneration than would ordinarily be paid for towing a vessel from the place where The Betsey was lying at anchor up to London. It may be true, as was suggested by the counsel for The Copeland, that the sum offered is not a much higher sum than would be customarily paid. Still, in my judgment, it is not sufficient to give to the agreement in question the character of a special agreement, under the circumstances of the case. It would, I conceive, be exceedingly dangerous to allow such agreements to be set aside, unless upon strong and sufficient reasons. I see no such reasons in the present instance, and I must therefore pronounce that the tender of 50% is a sufficient tender, and I must give the owners of The Betsey their costs from the period when such tender was made.



[ \* 175 ]

\* THE NICOLINA, Derelict.

July 20, 1843.

Apportionment of a salvage award between the owners and crew of a salving vessel. Half costs only given where separate appearances had been given for the mate, and for the owners and rest of the crew.

In this case The Nicolina, a Russian vessel, was discovered at sea, abandoned by her crew, about ninety miles to the N. W. of the Scilly Islands. The master of The Clara and Emma, a West India-

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The Nicolina. 2 W. Rob.

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man, with a valuable cargo on board, and bound from Jamaica to London, put three of his men and his chief mate on board the derelict, and she was brought with difficulty to Milford Haven, upon the 4th of April last.

The value of the ship and cargo was 1,153*l*. An action was entered by the owners, master, and crew of The Emma, and a separate action was brought by the mate.

The Court awarded 550*l*., and, in delivering its judgment, observed:— With respect to the apportionment of the sum awarded, the distribution, in all cases of this kind, between the owners and the crew, must depend upon the peculiar circumstances of each individual case. Where no risk has been incurred by the vessel rendering the assistance, it is not the usual custom for the court to decree to the owners any large portion of that reward which more properly belongs to the individuals whose services have effected the safety and preservation of the ship. Upon the present occasion, I must not forget that the ship and cargo of The Emma are of considerable value, and that a large portion of her crew was withdrawn, and consequently, to a certain extent, the risk of The Clara and Emma was increased. I shall allot 100*l*. to the owners. With respect to the captain, as the whole responsibility \*rested upon [\* 176] him, I shall allot to him the like sum of 100*l*. Also to the mate I shall allot 100*l*. To the three men who went on board the derelict I shall award 150*l*.; and the remaining 100*l*. to the men who remained on board The Clara and Emma.

With regard to the costs, I regret that there has been a separate appearance for two sets of salvors; because, in cases of this kind, it is not right to put the property of this description to double costs. On the present occasion, I shall give half costs to each of the parties.

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The True Blue. 2 W. Rob.

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THE TRUE BLUE, Roberts.<sup>1</sup>

July 27, 1843.

Agreement between the master of a vessel salvaged and the salvors upheld.<sup>2</sup>  
Claim of the salvors dismissed.

THIS was also a question respecting an alleged agreement in a case of salvage, under the circumstances noticed in the judgment of the court.

The case was argued by *Phillimore, A. A.*, and *Elphinstone*, for the salvors.

*Queen's Advocate* and *Bayford*, for the owners.

PER CURIAM.

The statements which are set up in this case, on behalf of the respective parties in the suit, are more than usually conflicting. The averment of the salvors is to this effect:— That the vessel, laden with a cargo of anchors and other articles of that description, struck upon the West Rocks, about seven miles from the port of Harwich, on the morning of the 20th of March last. It is, I conceive, very unimportant, in any view that I can take of this case, to ascertain at what precise period of the day the vessel so struck upon [ \* 177 ] the rocks. \* Being upon the rocks, the salvors, it appears, immediately went out to her assistance in two boats; The *Sylvan*, commanded by James Cook, and The *Aurora's Increase*, whose master is a person of the name of Edward Lewis; and, according to the statement of the salvors, they reached the vessel between seven and eight o'clock in the morning, when their services were immediately accepted, for the purpose of assisting to get the ship off the rocks. An agreement, it is admitted, was made between the master of The True Blue and the salvors, when their services were so accepted; but this agreement, it is alleged on behalf of the

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<sup>1</sup> [S. C. 2 Notes of Cases, 413.]

<sup>2</sup> [The *Henry*, 2 Law & Eq. R. 565; The *Graces*, 2 W. Rob. 294; The *Betsey*, 2 W. Rob. 167; The *Salacia*, 2 Hagg. Ad. R. 265; The *Mulgrave*, 2 Hagg. Ad. R. 77; The *Westminster*, 1 W. Rob. 235; The *Sarah Jane*, 2 W. Rob. 115; The *Zephyr*, 2 Hagg. Ad. R. 47; *Bearse v. 340 Pigs of Copper*, 2 Story, R. 314; The *Repulse*, 2 W. Rob. 396.]

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The True Blue. 2 W. Rob.

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salvors, was limited, and strictly limited, to the service of laying out the anchor. When that was done, the stipulated service of the salvors was concluded, and the agreement was at an end; and, for any further services which might be rendered, they were, according to their representation, to receive a further remuneration. It appears that they proceeded to render their assistance, by laying out the anchor in the first instance; and it has been much discussed in the argument, whether the anchor was laid out in a proper direction or not. This point, if it be necessary, I will consider hereafter. It further appears that, before the vessel was got off the rocks, the wind increased; and that when she did finally get off, whether by the exertions of the salvors, or whether she floated off herself, other salvors were, at their instance and by their recommendation employed, and by the united assistance of four other smacks, in addition to the two first employed, the vessel was eventually brought safely into the harbor of Harwich, at half-past one, P. M., \* of the [ \* 178 ] same day. Such, in substance, is the case which is set up by the salvors upon the present occasion, and if the facts of the case were precisely in accordance with the representation here given, I should entertain no doubt whatever that the salvors would be entitled to a reward considerably higher than the sum of 6*l.*, which has been tendered; because although the vessel might, perhaps, originally have been in no great danger when she first struck upon the rocks, yet the increase of the wind would have rendered it exceedingly expedient, if not indispensable to her safety, that she should be got off without loss of time. I will now refer to the averment of the owners of The True Blue. It is stated, on their behalf, that Cook and Lewis were the principal persons concerned, and that the master of The True Blue entered into a negotiation with these two individuals, whereby they undertook, according to the terms of the agreement, to which I will presently advert, to effect the release of the vessel from the rocks, and to conduct her into the harbor of Harwich. It is also further stated that the salvors, in performing the service, such as it was, did not conduct themselves with adequate skill; and, lastly, that there was no necessity for the employment of the other four boats, and that they were engaged by Lewis and Cook, without the consent of the master of The True Blue, and against his will and repeated expostulation.

The first consideration, then, to which I must address my attention is the agreement in question. It is in these words:—“It is this day firmly agreed by James Cook and Edward Lewis, with Robert Roberts, master of The True Blue, of Aberdeen, to assist him to get the ship off the West Rocks, and to the [ \* 179 ] port of Harwich, if required, for the sum of 6*l.* sterling.”



Now I entertain no doubt whatever, that an agreement of this description can be legally made between a master of a vessel in distress and persons affording a salvage assistance, provided there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned; and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves. Such an agreement, I feel no hesitation to pronounce, would be a binding instrument, not to be disturbed by a judgment of this court. On the contrary, it would be the duty of the court to enforce the fulfilment of such an agreement; and I am borne out in this opinion by the authority of Lord Stowell, in the case of *The Mulgrave*,<sup>1</sup> which has been cited by the Queen's Advocate.

The real issue, therefore, which I have to determine in this case is, whether or not an agreement, to the effect stated, was executed between the parties in the suit. But, before I consider this point, I will look to the parties themselves, and their capability of entering into such a contract. With respect to the master of *The True Blue*, it is most undeniably clear that he was perfectly competent, acting on behalf of the owners, to enter into any *bonâ fide* agreement which he might think requisite, for the purpose of fixing the remuneration for the services he required. With regard to the salvors, on the other hand, I see no reason to suppose that they were persons so unin-

formed and ignorant of their own interests, as not to be  
[ \* 180 ] equally capable of \* binding themselves by an agreement,  
to which both of them had appended their signatures.

There was no such imminent emergency as to prevent time for due consideration. The weather was moderate when they came on board, and there was nothing to induce them to enter into the agreement, without a just regard to their own interests and the extent of the service to be performed. Of all persons in the world, they were the most competent to form an estimate as to the value of the service which was required from them; and it is no argument against the validity of the contract that, in the first instance, it was entered into under the impression that the service would be light, but that, in consequence of a change of weather, or other circumstances of that nature, it subsequently became more onerous. It is the very nature of agreements of this kind to fix a stated sum as a compensation for a stated service; and the parties who enter into the engagement take the risk of any change of circumstances which

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<sup>1</sup> [2 Hagg. Ad. R. 77.]

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The True Blue. 2 W. Rob.

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may, in effect, alter the extent of the stipulated service. In the present instance, if the vessel had floated off the rocks immediately after the agreement was signed, and before the services of the salvors commenced, the master of The True Blue would have been bound to pay them the stipulated sum of 6*l*. And can it be doubted, for a single moment, that the salvors, supposing the agreement was duly entered into, were equally bound to fulfil their part of the contract, although much greater difficulties might have been introduced into its performance than were originally contemplated by them. Such a position would be alike repugnant to common sense and to all principles of equity and justice. Being, \*therefore, [ \*181 ] of opinion that, in point of law, there was nothing inequitable or unjust in the agreement in question, and that, if duly executed by the parties, it is a valid and binding agreement, I must now examine the terms of the contract, and see whether it was *bonâ fide* entered into in point of fact.

It is admitted that the signatures to the agreement are the proper signatures of Cook and Lewis, the immediate parties in the suit. I apprehend, therefore, that *primâ facie*, unless the contrary be proved, they must be considered to be cognizant of the contents of the instrument, and to have intended to bind themselves according to its tenor. This is the natural presumption, and is also the presumption of law; and this presumption is further confirmed by the evidence in the cause, and the probabilities of the case itself. On the part of the master, David Bruce distinctly swears that the agreement was read over to the persons, and was also read by them; and I do not find any distinct statement or plea, on the part of the salvors, contradicting the averment that it was so read over. But what are the probabilities? Is it probable that these two persons being called upon by the master to execute a written agreement, which so deeply concerned their interest in the transaction, would be satisfied without hearing it distinctly read over, or without reading it themselves? Again: is it probable that, having learnt the contents of the instrument, they could have misunderstood their purport and effect? The statement made by the individuals themselves in their affidavits of the 10th and 11th of June, is utterly irreconcilable with the whole course of the transaction. Their statement is, that they signed an agreement for 5*l*., simply for \*the service of laying out [ \*182 ] an anchor, and getting the vessel off; and that subsequently to the signing of this agreement, a discussion took place respecting the payment of an additional one pound to Edward Lewis, for piloting the vessel into Harwich harbor. This statement on the part of the salvors, it is manifest, is not deserving of the slightest attention.

at the hands of the court, and for the following reasons. In the first place, it is evident not only that the agreement in question contains nothing of the kind, but that the transaction never could have assumed that shape, because it is to suppose that the master, after the signatures had been appended, entered into a negotiation in the very teeth of an agreement in his own handwriting. There is also this further fact to be noticed, namely, that it is morally impossible that any person signing the agreement could not see the sum of money which was stipulated to be paid, that it was not 5*l.*, but 6*l.* Before the signature there is written the words, "*The sum of six pounds sterling;*" and in figures, again, at the foot of the agreement, there most clearly appears 6*l.* Again, looking to the terms of the agreement, it is equally impossible that any mistake or misapprehension could by possibility have occurred. "It is this day firmly agreed with James Cook and Edward Lewis, with Robert Roberts, master of The True Blue, of Aberdeen, to assist him to get the ship off the West Rocks, and to the port of Harwich, if required, for the sum of 6*l.* sterling." A clearer agreement, or one more capable of being easily understood, has, I think, been seldom exhibited in this court.

[ \*183 ] My conviction is, that it was most distinctly \*understood by the salvors upon the present occasion; and this conviction is strengthened when I look to the circumstances under which it was manifestly executed. Other smacks, it appears, were coming up at the time, able and willing to have rendered a similar assistance to this vessel; and the appearance of these smacks would render it most probable that the original salvors were desirous at once to close the bargain, and to secure the job to themselves; and the weather being moderate, they thought that, in the sum of 6*l.*, they should receive a sufficient reward for their services. Under the circumstances of the case, then, I am of opinion that the agreement is a valid agreement, and that it is binding not only upon Cook and Lewis, the immediate parties contracting with the master of The True Blue, but upon the whole of the crews of the two boats, The Aurora's Increase and The Sylvan. I have, therefore, no discretion but to reject the demands of these two vessels, their masters and crews.

With regard to the four other smacks,—by whom was it that they were employed, and was their employment indispensable?

Upon this part of the case there is, I must say, much in the statement of the salvors which excites a considerable doubt of its accuracy. The result of my examination into such statement is to induce me to believe that the other salvors were engaged by Lewis and Cook, against the will and inclination of the master of The True Blue, and for the purpose of effecting a service which Lewis and Cook had

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The Fama. 2 W. Rob.

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themselves undertaken to perform. I am therefore of opinion that the crews of these smacks, if they have any claim at all to be remunerated, must \*resort to those individuals who [ \*184 ] employed them, and not to the owners of this vessel. I therefore pronounce for the tender, but I shall decline to give costs.

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THE FAMA.<sup>1</sup>

July 27, 1843.

Cause of damage by collision. Owners of the damaging vessel voluntarily taking a duly licensed pilot on board under the provisions of the general Pilot Act, 6th G. IV., absolved from responsibility, the accident having occurred within the waters for which the pilot was licensed, and being entirely caused by the misconduct of the pilot alone.<sup>2</sup>

In this case, the brig Emma, on her voyage from Sicily to Southampton, was run foul of by this vessel in Falmouth Roads, upon the 25th of April last. An action was entered for the amount of the damage sustained; and upon the 13th of July, the cause was heard before Trinity Masters, who pronounced that the collision was occasioned exclusively by the misconduct of the pilot who was in charge of The Fama at the time.

The court directed the case to stand over, for further consideration of the point whether the pilot on board The Fama was a licensed pilot under the provisions of the general Pilot Act, 6th G. IV. c. 125.

*Addams*, for the owner's of The Fama, now stated that the pilot was a licensed pilot, under the general act, and was proceeding to argue in support of the owner's exemption under the authority of the decision in the case of *Lucey v. Ingram*, when he was stopped by the court.

PER CURIAM.

I need not trouble you; I am quite satisfied. I did not dispose of the case when the Trinity Masters attended, because I was not aware by whom the pilot was licensed. If he had been licensed by a corporation or a company, under the provisions of an act of \*parliament peculiarly referring to such corporation, a diffi- [ \*185 ] culty might have arisen which would have required further

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<sup>1</sup> [S. C. 2 Notes of Cases, 418.]

<sup>2</sup> [The Protector, 1 W. Rob. 45.]

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The Columbine. 2 W. Rob.

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consideration; but, as it now appears that the pilot was licensed by the authority of the Trinity House, in conformity with the provisions of the general Pilot Act, 6 G. IV., and that at the time of the collision he was actually within the waters for which he was licensed, the difficulty is altogether removed. The case fairly falls within the principal of the decision in the case of *Lucey v. Ingram*,<sup>1</sup> by which it was determined that the owners were absolved from liability where the damage was occasioned by the misconduct of a pilot in charge, and acting in pursuance of the provisions of the act, although not taken on board in virtue of any of the compulsory clauses. The decision in question was grounded upon the consideration of the whole statute, but more especially with reference to the 72d section, which directs "that every pilot, whether licensed or to be licensed, who shall, when not actually engaged in his capacity of pilot, refuse or decline or wilfully delay to go off to or on board of, or take charge of any ship or vessel requiring a pilot, and within the limits specified in his license, shall be subject to certain penalties." The Court of Exchequer were of opinion, that although it was not compulsory on the master to employ such pilot, yet if he thought fit so to do, such pilot was a pilot acting in pursuance of the provisions of the act, and consequently fell within the provisions of the 55th section. The principle upon which their opinion rested was that it was desirable, for the general safety of navigation, in cases where the taking a pilot was not compulsory, to encourage the masters of vessels to

[ \* 186 ] \* receive them on board. The present case falls within that construction of the statute, and I must therefore pronounce that the owners of this vessel are exonerated, but I shall make no order for costs.

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THE COLUMBINE.

July 27, 1843.

Apportionment of a tender in a cause of salvage. Claim on behalf of the owners of the salvaging vessels, to the shares of the apprentices who were on board, overruled.<sup>1</sup>

*Semble* — even if a previous contract had been made to that effect, such contract would be null and void, as against equity and public policy.

An apportionment to the apprentices directed.

THIS was a question as to the apportionment of a tender, which had been accepted by the salvors, in a cause of salvage.

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<sup>1</sup> [6 Mees. & Welsby, 302.]

<sup>2</sup> [See *The Two Friends*, 2 W. Rob. 349.]

## PER CURIAM.

A tender of 600*l.* has been accepted by the salvors in this suit, and an agreement has been made between the owners and crews of the two smacks, that the sum tendered shall be equally divided between them. The only point, therefore, which the court is called upon to determine, is the apportionment of the two moieties amongst the owners and crews of the respective vessels. A claim has been asserted, by the owners of the two vessels, to the shares of the apprentices who were on board; but I cannot accede to the claim which is so made, and for the following reasons. In the first place, I conceive that even if a previous contract had been made to that effect, such contract would be null and void as against equity and public feeling, because it would be a very great discouragement to persons in the situation of apprentices, who are often the most efficient hands in vessels of this description; and secondly, it would be contrary to all justice to give the reward for personal risk and exertion, to persons who have not encountered the one or undertaken the other.

\* Having disposed of this point, I will now look to the [ \* 187 ] two cases, and divide the sum to be distributed in the proportions in which I think the several parties are entitled. The Gratitude, it appears, was the vessel which first boarded The Columbine; and it is admitted in the affidavits that the chief responsibility was undertaken by a person of the name of Head, who composed one of the crew. The merits of this individual are still more strongly testified in the certificate of the master of The Columbine, who states in the most unqualified terms the benefit he derived from his exertions. I think, therefore, that he is entitled to receive an extra remuneration; and in addition to what he will otherwise receive, I shall award him 20*l.* As regards The Gratitude, then, the apportionment which I shall direct will be as follows:—To the master I shall allot the sum of 50*l.*; to the two men on board, (Richard Head being one,) 40*l.* each; and to the two apprentices, 20*l.* each. The remaining sum of 110*l.* I shall direct to be paid to the owner of The Gratitude.

With respect to The Two Sisters, the circumstances of the case are somewhat different, and it will be impossible to carry out the apportionment precisely upon the principle adopted in the case of The Gratitude. The crew of The Two Sisters, it appears, consisted of a master, a mate, and three apprentices. The apportionment which I shall direct will be as follows:—To the master, 60*l.*; to the mate, 50*l.*; and to each of the apprentices, 20*l.* The remaining 130*l.* I shall decree to the owner of The Two Sisters; and my reason for awarding a larger sum to the owner than I have given in the case of The Gratitude is this, namely, that there \*were [ \* 188 ]



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The Ann and Mary. 2 W. Rob.

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three apprentices on board The Two Sisters, but only two on board The Gratitude. Although I am clearly of opinion that the owner is not entitled to receive the whole benefit of the apprentices' exertions in a salvage service, yet I think the nature of the apprentices' connection with the vessel is to be taken into reasonable consideration, and, to a certain extent, the owner should be benefited from that source.

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[ \*189 ]

\* THE ANN AND MARY.

November 4, 1843.

In doubtful circumstances, where there is a probability of collision, a vessel on the larboard tack, although close hauled, is bound to give way to a vessel upon the starboard tack, notwithstanding the latter may be sailing at the time with the wind free.

THIS was a suit promoted by the owners of The Lady Clinton, against the owners of a vessel called The Ann and Mary, for damage sustained by a collision on the 5th of December, 1842. An action at law had been brought by the owners of The Ann and Mary, against the owners of The Lady Clinton, arising out of the same collision, and the trial had been held at Durham, during the spring assizes, when a verdict was found for the plaintiffs.

The Court was, in the present instance, assisted by two of the brethren of the Trinity House.

The case was argued by

*Haggard* and *Twiss*, for The Lady Clinton.

*Queen's Advocate* and *Bayford*, for The Ann and Mary.

DR. LUSHINGTON, (addressing the Trinity Masters.) Gentlemen, you have had ample opportunity of reading all the papers and evidence in the cause, and you have also heard the question fully discussed by counsel at the bar; it will not, therefore, be necessary for me to trouble you with any detailed observations. There are, however, some points upon which I consider it my duty to address you. One peculiar feature in this case arises from the fact, that an action at common law has been brought by the owners of The Ann and Mary, the vessel proceeded against in this suit, against the owners of The Lady Clinton, on account of this very collision; that cause has been

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The Ann and Mary. 2 W. Rob.

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tried, and a verdict was found on that occasion for the plaintiffs. The first question then is, what weight \* ought such a [ \* 190 ] verdict to have on your and my minds? If this case was a simple question of fact, and merely to be decided by the credit of the respective witnesses, without being examined with reference to nautical skill, undoubtedly the decision of a jury, if the judge approved of the verdict, ought to have considerable weight; it would not, however, (and it is not attempted on the present occasion to say that it would,) be a bar to the action. We do not know, and we cannot know, what occurred at the trial; but of this we may feel assured, that, from the nature of the case, there would be great discussion as to the quarter from which the wind blew. With regard to the credibility of witnesses, it has been contended at the bar, that questions of fact are much better tried in a court of common law, where the evidence is given *vivâ voce*, than in this court, where it is given in writing. As far as my own experience goes, I feel disposed to say, that, in all ordinary cases of fact, much more reliance is to be placed upon *vivâ voce* than upon written evidence; and for this reason, that in the former case witnesses are openly examined and cross-examined; but it is a very different thing when a question is to be tried involving facts with which, in all probability, neither a judge nor a jury are conversant, and when consequently they cannot know whether the facts deposed to are reconcilable with the principles of admitted science. A witness, for example, may give evidence with great apparent truth and plausibility, and yet the facts he states may be inconsistent with possibility, or, according to well recognized principles, such facts may be incredible. I myself have known an instance of this; I have known a witness to depose that a ship was sailing within three or four points of the wind, a fact which would at once destroy his credit \* with persons of nautical [ \* 191 ] experience, although it might not have the same effect in the minds of a judge and a jury. I must, therefore, say, with all due deference to the verdict of the jury, that it is not to be considered as binding upon our judgment in this particular case. I may now advert to the circumstances of the case in question: this action is brought by The Lady Clinton against The Ann and Mary, and the first observation which I feel it right to make is, that as the misconduct of The Ann and Mary is charged to have been the cause of the damage, the parties proceeding are bound to make out their case. If then you should be opinion, from the whole of the evidence, that there is a failure of proof on the part of the plaintiffs, you must decide in favor of the party proceeded against. With regard to the facts of the case, those which appear to me to be material lie in the

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narrowest compass. There is, indeed, great discrepancy in parts of the evidence on the one side and on the other, but I will first endeavor to point out those which are incontrovertible. The Lady Clinton was laden with coals, and was proceeding towards the port of Dover. She was on the starboard tack; her course was south-east, and, according to her statement, the wind was south-west or south-west by west; the two first of these facts is undenied, the third is controverted. On the other hand, the statement on behalf of The Ann and Mary is, she was in ballast, on the larboard tack, her course north by west, the wind west and by north. Now if the statement made on behalf of the owners of The Lady Clinton be true, I apprehend that there is no question whatever; indeed it is admitted at the bar, that if her statement as to the wind be correct, what she did on that occasion was perfectly right and proper; and then it [ \* 192 ] would \* follow, that The Ann and Mary, although she did not alter her course when she first descried The Lady Clinton, yet, as she did afterwards alter it by putting her helm down, was in error. Assuming the wind to be, as stated by The Lady Clinton, south-west or south-west by west, on descrying The Lady Clinton it was the duty of The Ann and Mary not to have put her helm down, but to have kept her course; but her own statement is, that, although she at first kept her course, she did just before the collision put her helm down. This brings the case to the point on which there has been so much discussion, namely, as to the precise quarter in which the wind was; this evidence consists in the affidavits of the masters, the mates, and the crews of the two vessels, and each side swear in support of their respective statements. There are also persons of respectability who give evidence on both sides, and some of whom were on the spot at the time; and there are also entries from various logs kept at different parts of the coast, and which are not, perhaps, wholly reconcilable with each other, unless, gentlemen, you, with your nautical knowledge, may be able to reconcile them. Now, certainly, I am of opinion, so far as depends on the balance of credibility on the one side or the other, that I cannot take upon myself to tell you that either party has not stated the truth according to their respective statements. It becomes, therefore, very desirable that you should, if possible, come to a conclusion from the facts admitted in the case, or not contested, and without reference to the conflicting parts of the evidence. I am not, however, aware that the circumstances of this case furnish you with sufficient facts to enable you to do this. There do, however, appear to me to be two cir- [ \* 193 ] cumstances deserving of great consideration. I may \* be mistaken; if so, you, gentlemen, from your nautical judg-

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ment, will be able to show where the delusion exists. It is stated, and not denied, that The Lady Clinton, after the collision, made for the shore and came to anchor, and also that the other vessel proceeded on her voyage. Now if this had been stated in the original pleadings, namely, the fact that The Lady Clinton made for the shore on the larboard tack, it would have been incontrovertible evidence that the wind could not be from north by west. It has not, however, been so averred, and I request you, therefore, not to rely in the slightest degree on any statements in the affidavits that The Lady Clinton was on the larboard tack when she came to anchor; but you will consider whether the fact of her having proceeded to anchor and having approached the land, can lead to the conclusion that the wind could not have been to the north by west. There is another circumstance which weighs strongly on my mind. It has been contended on the part of the owners of The Ann and Mary, that there was a want of a good look-out, and negligence on the part of the master and crew of The Lady Clinton. I cannot, however, discover on the face of the evidence any circumstances which will support that averment; the only fact relied on for that purpose is, that The Lady Clinton, when she first descried The Ann and Mary, was not able to discover whether she was going the one way or the other. It is stated on the part of The Lady Clinton, that she first descried The Ann and Mary at some distance off; and that is quite consistent with the statement, that at that distance she was not able at first to discover which way the other vessel was standing; but it is also stated, and not denied, that as soon as she did discover the precise course the other vessel \*was proceeding [ \* 194 ] on, the master of The Lady Clinton caused a lanthorn to be exhibited over the lee bow, for the purpose of giving notice of his position. This is an act at least showing that he was on the alert; whether the light was blown out, or went out by accident, is a circumstance which does not detract from the intention, although The Ann and Mary may not have derived the benefit of the intended warning. As it is, I see no reason for assuming that a proper look-out was not kept on board this vessel. What did she do, as soon as she discovered the real state of the circumstances? She put her helm a-port. On the part of The Ann and Mary, it is stated, that her crew saw The Lady Clinton one quarter of a mile off. Now this is a circumstance which, if it be true, and I assume it to be true, strikes me thus: if the master of The Lady Clinton, as soon as he discovered the position of The Ann and Mary, did put his helm to port, and if the master of The Ann and Mary, who saw The Lady Clinton one quarter of a mile off, did keep his course, until the mo-

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ment before the collision, how was it possible that the two vessels did not go clear of each other? I cannot think, on this supposition, that the case can be as represented by the owners of The Ann and Mary. Now, gentlemen, if the wind be, as represented by The Lady Clinton, her measures were correct, and it necessarily follows, that, if you believe this to have been so, you will give your judgment for her; if, on another supposition, the wind was free for both vessels, if the wind was somewhere between west and by north, and south-west by west, then The Lady Clinton was on the starboard tack, and The Ann and Mary was on the larboard; in that case also I apprehend that you will pronounce in favor of The Lady Clinton.

[ \*195 ] But you must also take into your \*consideration a third state of the case; supposing you to be of opinion, and to come to the conclusion, that the wind was as represented by The Ann and Mary, did that vessel pursue a proper course, on descrying the other vessel coming on in a straight direction, or almost in a straight direction? You will consider whether, under this state of circumstances, according to nautical principles, although she might be close hauled, and the other vessel might be sailing free, The Ann and Mary ought not to have pursued measures different from what she did. You will take all these circumstances into your consideration, and give me your opinion as to what was the cause of the collision.

*The Trinity Masters.* The Ann and Mary, by her own statement, saw The Lady Clinton one quarter of a mile off, nearly right a-head, or a little on the lee bow. The Ann and Mary was close hauled on the larboard tack. Although it was not a dark night, it must have been difficult to judge whether the approaching vessel was standing close to the wind or a little off; it was therefore the duty of The Ann and Mary to bear away, as is the established law under doubtful circumstances for all vessels close hauled on the larboard tack to do. We are of opinion that The Ann and Mary was wrong in what she did; a vessel close hauled on the larboard tack must give way, she never ought to have put her helm a-lee.

THE COURT. Pronounce for damages and costs.

*The Trinity Masters.* We beg to observe to this court, [ \*196 ] that the golden \*rule so long established must be strictly adhered to; it is this, that the vessel on the larboard tack is to give way, and the vessel on the starboard tack to hold on. And the new rule which has lately been made for steam vessels, namely,

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each to put the helm a-port, under all doubtful circumstances, assimilates with it. The vessel on the starboard tack puts her helm a-port to keep her wind, and the vessel on the larboard tack does the same to bear away. The same rule now applies to sailing as well as to steam vessels, and if it be strictly adhered to, there will not be one thousandth part of the accidents which now occur.

In the course of the argument of this case it was proposed to read the affidavits of two of the elder brethren of the Trinity House, who had been examined on the trial at law, stating their opinions on the case, arising from what they heard on the trial.

PER CURIAM.

These affidavits may be classed under one of two heads; either they contain evidence of what was said or done on the trial, or they are the opinion of nautical men with regard to evidence, on nautical points, given in the course of a trial. I have no hesitation in saying, that I can receive no evidence of this nature as to what occurred at a trial; most assuredly no partial statement of what occurred on that occasion could in the slightest degree influence my decision on the present question. If I wanted information on any point connected with the trial, the notes of the learned judge are the only authority to which I should resort. The opinions of nautical men on a question of seamanship, indeed of men of science on points of science generally, when a clear statement of \* the whole of the facts [ \* 197 ] has been laid before them, is admissible evidence in this as well as other courts; but in this case I am assisted by gentlemen of great skill and experience in nautical matters, and it would be most inconvenient, and injurious to the ends of justice, if in cases, where the court always has the benefit of, and derives the greatest assistance from, the opinions on nautical points of the Trinity Masters, the proceedings were allowed to be incumbered by any evidence by way of opinion on such points. These affidavits must on both grounds be rejected.



THE TRAVELLER.<sup>1</sup>

November 24, 1843.

It is the duty of the vessel on the larboard tack to give way to a vessel on the starboard tack at once, without considering whether the other vessel be one or more points to leeward. Damage pronounced for.

In this case The Yarm, a small schooner of forty-three tons, whilst proceeding from Bridlington to London with a cargo of oats, was run down on the night of the 4th January by the schooner The Traveller.

The collision took place when the two vessels were off the Spurn Light, and the schooner, The Yarm, was so severely damaged, that she sunk shortly afterwards. The present action was by plea and proof, and the case was argued before Trinity Masters<sup>2</sup> by —

*Addams and Robinson*, for The Yarm.

*Queen's Advocate and Harding*, for The Traveller.

## PER CURIAM.

Gentlemen, the question to be decided in this case is, which of the two vessels, under the circumstances detailed in the evidence ought to have kept the wind, and which ought to have given way. The facts of the case are unfortunately embarrassed by great [\*198] contradictions in the evidence on both sides; and with \*respect to the statement which is set up on behalf of The Yarm, the vessel proceeding in the cause, there is, you will observe, a discrepancy between the plea originally given in and the affidavits of the witnesses who have been produced in its support. There is also some discrepancy in the evidence of the witnesses themselves. This circumstance has been much commented upon in the argument at the bar: but having carefully attended to the observations of the learned counsel, I am bound to tell you that in my opinion the discrepancy is not such as would justify us in discrediting either the case set up by The Yarm or the evidence of the witnesses. In proceedings of this kind it not unfrequently happens that when the ori-

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<sup>1</sup> [S. C. 2 Notes of Cases, 476.]<sup>2</sup> [Captain Rees and Captain Gordon.]

ginal statement is given in, there are some points which are not clearly understood by the practitioners in the cause; hence it arises that the statement in the pleadings will occasionally be at variance with the evidence. In the present instance, in forming your opinion, you will have to look to the evidence and not to the original statement. With regard to the discrepancy between the witnesses themselves, I would observe that in all courts of law a discrepancy in the evidence upon non-essential points is no conclusive disparagement to the integrity of the witnesses. Where, on the contrary, the testimony of the witnesses strictly coincides in all minute particulars, there is much greater reason for disbelieving them, and not for giving them credit, because the probability is that the story has been shaped in concert, and that they have determined beforehand that they will agree even in the most minute particular.

Let us now, gentlemen, consider the facts of the case as they are set forth on the one side and the other. The statement of The Yarm is, that she was \*proceeding from Bridlington to [ \*199 ] London with a cargo of oats, the wind being W. S. W., and her course lying S. with a starboard tack on board; that shortly after passing the Spurn Light she perceived The Traveller approaching, upon which she kept her course, and hailed The Traveller to put her helm a-weather; but The Traveller paid no attention to her hailing, but kept her course. Such is the statement in plea which has been given in on behalf of The Yarm. In the evidence of her witnesses, however, the collision is attributed not merely to The Traveller having kept on her course, but also to her having put her helm to leeward, so as to come more directly in contact with The Yarm. Now, according to my view of the case, as I have already observed, although this is to a certain extent a departure from the averment in the plea, if the matter rested here, I do not think that the discrepancy between the statement in plea and the evidence of The Yarm's witnesses could materially affect the merits of the question to be decided; and for this reason,—that if it was the duty of The Traveller to give way, it is of no importance whether she omitted to give way or kept her helm to leeward; in either case it is obvious that she would have been equally in fault.

Let us now look to the case which is set up on behalf of the vessel proceeded against. After stating that she was proceeding on the larboard tack and in a northwesterly course, the wind being W. by N. to W. N. W., she further alleges, that when the two vessels were approaching each other, The Yarm was hailed to go to the windward. This is an important averment, as showing that, in the judgment of the persons on board The Traveller, it was incumbent upon The

Yarm to give way, and her own duty was to keep her course. [ \*200 ] With respect to the relative position of the \*two vessels at the time, there is a contradiction in the two statements. On the part of The Traveller it is averred, that when first descried The Yarm was about two points on the lee-bow of The Traveller. On the part of The Yarm the statement is of a contrary nature. I do not think it necessary to enter into a minute consideration as to which of these statements is correct; and for this reason,—in the first place, it would be most extremely difficult to ascertain the point from the evidence before us; and secondly, I apprehend that it has been distinctly laid down over and over again that when two vessels on opposite tacks are approaching each other, and there is a probability of a collision, it is the duty of the vessel on the larboard tack to give way at once, without considering whether the other vessel be one or more points to leeward.

There is one other circumstance to which I will advert before I conclude my observations. It is admitted by the witnesses on behalf of The Traveller, that upon the night when the collision took place a vessel might have been seen a mile off. The night therefore could not have been a dark night. It is also further admitted on the part of The Traveller, that when she first descried The Yarm, there was ample time to have put her helm to windward; but that according to her judgment this was not a proper measure to be adopted, but that she was bound to keep her course. Gentlemen, you will have the goodness to take all these circumstances into your consideration, and to favor me with your opinion whether you think that The Traveller is to blame.

*Trinity Masters.* The Traveller ought to have given way.

[ \*201 ]      \* PER CURIAM.

In that case I pronounce for the damage of course, with the costs.

Both this and other decisions which have taken place are very important, with respect to vessels engaged in the occupation in which these vessels were employed, as establishing the principle, that at night it is the duty of the vessel on the larboard tack to give way to a vessel on the starboard tack, even although the latter should be sailing with the wind free.

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The Virgil. 2 W. Rob.

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THE VIRGIL, Wilson.

December 5, 1843.

Masters of vessels, navigating at night, are bound to use all proper precautions for avoiding the chances of collision.

A vessel sailing upon a dark and foggy night, with her topmast studding-sails set, condemned in the damage sued for.<sup>1</sup>

IN this case The Virgil, a brig of 237 tons burden, bound from Archangel to Bristol, with a cargo of deals, battens, &c., at about eight o'clock, P. M., of the night of 6th October, came into collision with the sloop Jean, which, from the damage she received, shortly afterwards sunk, her crew being saved on board The Virgil. An action was entered in the sum of 500*l*.

The act on petition, in substance, pleaded that the sloop Jean, of forty-nine tons or thereabouts, was in the prosecution of a voyage from Hartlepool to Dundee, with a cargo of coals, and about half-past seven, P. M., of the evening on which the collision occurred, she was off Coquet Island, the Coquet light bearing W., distant about three miles and a half, the wind N. W. by W., with a stiff breeze, the sea being smooth and the night dark; that the said sloop was on the larboard tack upon a wind steering about N., and a good look-out was being kept on board when the brig \* pro- [ \* 202 ] ceeded against was observed on the sloop's starboard bow, having her topmast studding-sails set, steering S., half W., and about 'two ships' length distant; that said brig was instantly hailed by the mate of the said sloop, but that she returned no answer, and continued her course without any alteration; the consequence of which was, that she struck the sloop, which neither did nor could do any thing to avoid the collision, with such force as to cut her down to the water's edge, and the sloop shortly afterwards went down head forwards, and was totally lost.

The case set up by the owners of The Virgil, in the answer to the act on petition, was to the effect — That a good look-out was kept on board The Virgil, but that in consequence of the state of the night, which was described as hazy and very dark, it was impossible for the persons on board The Virgil to see the sloop, which, being

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<sup>1</sup> [S. C. 2 Notes of Cases, 499; The Switzerland, 2 W. Rob. 482; The Ebenezer, 2 W. Rob. 206; The Itinerant, 2 W. Rob. 236.]

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The Virgil. 2 W. Rob.

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small and deeply laden and sailing close to the wind, there was merely the thickness of her masts to form a loom; that no hailing was heard on board the brig, and that the said brig, notwithstanding the greater size of her loom, was not seen from the sloop until the moment of the collision. The answer to the act then further denied that the accident was occasioned by any neglect or misconduct of the persons on board The Virgil, but was wholly and entirely the result of inevitable accident, owing to the darkness of the weather, and that admissions to this effect had been made and repeated by the master of The Jean, subsequent to the collision in question.

These declarations were, as a matter of course, counterpleaded and denied in a rejoinder on behalf of The Jean.

The case was argued by *Haggard* and *Robinson*, for The Virgil.

[ \* 203 ]   \* *Addams* and *Harding*, for The Jean.

PER CURIAM.

Gentlemen — It rarely happens, in cases of this description, that the court can place any safe reliance upon declarations or admissions purporting to have been made, *recenti facto*, by the masters or the crews of either of the vessels in the cause. Where such declarations are pleaded on the one side, it almost uniformly occurs that they are counterpleaded and denied on the other; and, in the conflict of evidence which necessarily arises, it is impossible for the court to ascertain, with any accuracy or satisfaction to itself, to which side a preferable credence should be given. Dismissing therefore from consideration, in the present instance, certain declarations which have been so much discussed in the arguments of the learned counsel, I will endeavor, as shortly as possible, to bring under your notice the real facts of the case, as they are represented to have taken place previously to and at the time of the collision in question. The statement on behalf of The Jean, the vessel that was run down, is shortly to this effect:— She was, it is alleged, proceeding northwards on the larboard tack, with the wind N. W. by W., and about half-past seven in the evening of the 6th of October last, and when about three miles or three miles and a half off the Coquet Island light, she descried The Virgil, the vessel proceeded against, approaching on the larboard bow. It is further alleged on her behalf that, being on a wind, it was totally impossible for her to change her course, and that the other vessel ran into her and sunk her. Such is the statement on the part of The Jean; a short statement, it is true, but one that, in my view of it, is quite sufficient, and which fixes the

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The Virgil. 2 W. Rob.

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locality of the \* accident beyond all question of doubt. I [ \* 204 ] will now advert to the defence which is set up by The Virgil, and, in so doing, I must observe that this defence is, in some respects, of an extraordinary description. After stating her own voyage, and the place where the collision occurred, the answer of The Virgil simply alleges that the night was very dark and hazy, and that a good look-out was kept by the watch on deck. Is it not extraordinary that in this answer, which is her defence, and which ought to contain the whole of that defence, there is not to be found one single averment as to the wind, as to the rate at which the vessel was sailing, as to the tack she was on, as to the course she was pursuing, as to the sails that were set, or as to which bow was struck? Not one single averment, I repeat, respecting any of these matters, is to be found in the answer to the act on petition; a circumstance, I must say, which is calculated not only to excite a considerable surprise in the mind of the court, but to put a very considerable difficulty in the way of The Virgil herself. The practice of the court requires, that all the essential particulars of the defence should be set forth in the pleadings in the first instance; and if this court was to sanction the attempt which has been made, in the present instance, to supply the omission of these matters in plea, by importing them into the affidavits of the witnesses, great detriment and injustice must be done towards the adverse parties in the suit, by the introduction of matter which they could never have the opportunity of meeting.

Such, then, being the substance of the case set up by The Virgil, it is obvious that her defence is rested upon a case of inevitable accident; in other words, that the night was dark and hazy, and that she had not the power to avoid the collision. Now let us for \* a moment consider what is meant by the term, inevita- [ \* 205 ] ble accident. In my apprehension an inevitable accident, in point of law, is this, namely, that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of eight or nine miles an hour, when she ought to have proceeded only at the speed of three or four, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred, if he could have used measures of precaution that would have rendered the accident less probable. It may, undoubtedly, be important that a voyage should be completed in the most speedy manner; but such speed must be combined with safety to other vessels, sailing in an opposite course. This is the doctrine of the Courts of Admiralty,



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The Ebenezer. 2 W. Rob.

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in cases of this kind; and by this doctrine you must be guided in forming your opinion upon the present occasion. Let us then for a moment consider, in conclusion, how and in what degree the application of this doctrine bears upon the defence which has been set up by the owner of the vessel proceeded against.

Now, it appears to me there are only two points on which it is possible to fix upon The Virgil any want of propriety of conduct, namely, that she did not keep a good look-out, or that she was carrying a greater press of sail than she ought to have carried, under the circumstances of the case. Upon the first point, looking to the evidence before me, I am not prepared to affirm negatively that a good look-out was not kept. With respect to the more important matter, whether she was or was not carrying more sail [ \* 206 ] than, under the circumstances, she ought to have \* carried, it is to be noticed that she clearly had the wind free, and that, at the time of the collision, she was sailing with her studding-sail set. It is also to be borne in mind that the night is admitted to have been dark and hazy. Under these circumstances, gentlemen, then it remains for you to consider whether The Virgil has or has not so conducted herself, with respect to the quantity of sail she was carrying, that, in point of fact, she rendered the accident more probable than it would otherwise have been.

Trinity Masters<sup>1</sup> were of opinion that, looking to the courses of the two vessels, the state of the wind, and more especially to the darkness of the night, The Virgil ought to have been under more easy sail, and was, consequently, to blame.

Damage pronounced for, with costs.

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EBENEZER, Varwell.

December 12, 1843.

A vessel running free, with a fair wind, and carrying her squaresail, topmast studding-sail, fore and aft mainsail, and gaff topsail set, the weather being dark and thick, and the night foggy. Dismissed from further observance of justice in the suit, upon the ground of inevitable accident.<sup>2</sup>

THE act on petition, in this case, set forth that the snow, The

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<sup>1</sup> [Captain Locke and Captain Walker.]

<sup>2</sup> [See The Virgil, 2 W. Rob. 201.]

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The Ebenezer. 2 W. Rob.

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Concord, of the burden of 200 tons, sailed from the port of Newcastle, bound to the port of London, with a cargo of coals, on the morning of the 19th of May last; that the said vessel proceeded on her voyage without any material occurrence, till midnight of the 22d, when she was tacked to the southward, The Dudgeon light vessel bearing S. and by E. half E., distant about seven or eight miles, the weather clear and moderate, the wind E. S. E., and the said vessel, with two courses set, steering close to the wind on the larboard tack, at the rate of about three knots an hour, not being able to lay her course; that, at a quarter past one, A. M., the next day, the 23d of May, the weather began to darken and became very \* thick, so that objects could not be discerned at more than [ \* 207 ] two ships' length off, whereupon one of the watch, who was forward, began and continued blowing a horn, and another of the said watch continued keeping a good look-out; that about half-past one of the same day, a vessel was perceived right ahead of The Concord, but rather on the starboard bow, and steering directly for her, whereupon the helm of The Concord was instantly put hard a-lee, in order to deaden the blow, and thereby save life if not property, it being impossible to have avoided a collision, either by putting her helm up or by any other means, in consequence of the two vessels being so near, and the rapid rate at which they were then approaching each other; that before The Concord at all answered her helm, or altered her position, the said vessel, which proved to be The Ebenezer, the vessel proceeded against, ran into The Concord's starboard bow, doing her such damage as caused her to sink about an hour and twenty minutes after receiving the blow; that The Ebenezer, when so discovered, was running northwards, with a fair wind, and had a squaresail, topmast studding-sail, fore and aft mainsail, and gaff topsail set, the said squaresail being very deep, and preventing any thing being seen ahead of her; that there was no notice given of her proximity to any other vessel towards which she was running, and although hailed from The Concord, such hailing was ineffectual; that the said collision was entirely attributable to those on board The Ebenezer, in carrying such an improper press of sail on a thick foggy night, and in the fair-way course of coasting vessels, without the necessary precautions taken, and without a good look-out being kept on board.

The answer to the act on part of The Ebenezer \* admitted [ \* 208 ] that The Concord might have been sailing close to the wind on the larboard tack at the rate of three knots an hour, and that she was unable to lay her course; it also admitted that at the time of the collision the weather became very thick, but denied that a vessel

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The Ebenezer. 2 W. Rob.

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could at such time be seen at a distance of two cables' length off, or that the sound of a fog-horn was heard by any person on board The Ebenezer as coming from The Concord. It was also further admitted that The Ebenezer was running northward with a fair wind and a squaresail, topmast studding-sail, fore and aft mainsail, and gaff topsail set; and that at the time those on board The Concord saw The Ebenezer, the two vessels were so near that it was perfectly impossible for either The Concord or The Ebenezer to avoid the collision, notwithstanding the said Concord might have put her helm hard a-lee. The answer then in conclusion alleged that a good look-out was kept on board The Ebenezer, the captain sounding the fog-horn almost without intermission. That the sails which were set in the said schooner were not larger or more numerous than such as would be used by any person commanding a schooner of The Ebenezer's tonnage in such weather; and from the number of vessels, upwards of 400, in the North Sea at the time, had the said schooner carried less sail than she actually carried, she would have been in danger of being run down by some other vessels sailing in the same direction. That the collision was not at all attributable to the mismanagement of the persons on board The Ebenezer as assigned, but entirely attributable to the extreme thickness of the fog, and that no human power or skill could prevent the loss that occurred.

[ \* 209 ] \* The case was argued before Trinity Masters by

*Addams and Robinson*, for the owners of The Concord.

*Haggard and R. Phillimore*, for The Ebenezer.

PER CURIAM.

DR. LUSHINGTON. Gentlemen—In this case I must call your attention to one or two observations in the first instance, which I conceive are of importance both as regards the result of the case itself and the future practice of the court in cases of this kind. You are well aware, I presume, from the experience you have had in these cases, that all our proceedings are commenced by what is termed an act on petition, in which the party proceeding in the cause is supposed to set forth the whole grounds upon which he rests his case. You are also aware, I presume, that the answer of the party defendant in the suit ought to contain all the grounds of his defence, and not only so, but also any blame which he deems imputable to the party proceeding in the cause. Now this is of the utmost importance, and ought to be distinctly understood; and I hold it indispensable in this case and all others that we should consider the charge

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The Ebenezer. 2 W. Rob.

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on the one side and on the other upon what is originally stated in the pleadings in the cause, and if affidavits are produced in this or other causes at variance with these statements, or extraneous to them, such affidavits are to be rejected, as well as the arguments which are attempted to be drawn from them.

Having thus directed your attention to the principle upon which these proceedings are conducted, I will now briefly point out to you what was the original \*case set up on behalf of The [ \* 210 ] Concord, the vessel proceeding in the cause.

It is alleged, on her behalf, that at a quarter past one A. M. of the 23d of May last, the weather began to darken and become very thick, so that objects could not be discerned more than two cables distant. That about that period of time a vessel was observed right ahead of her, and steering directly towards her a little on the larboard bow. That in order to save the vessel, by deadening the blow, and thereby in all probability to save the lives of those on board, the helm of The Concord was instantly put hard a-lee, but that in consequence of the two vessels being so near to each other, and the rate at which they were so respectively sailing, it was impossible to avoid a collision, and before The Concord at all answered her helm or altered her position, the vessel, which proved to be The Ebenezer, the vessel proceeded against, ran into The Concord's starboard bow.

You will here observe, that the state of the weather, the distance at which the respective vessels could be seen, and the measures adopted by The Concord, are distinctly set forth. You will also observe, in a subsequent part of the act on petition, that the blame is expressly imputed to The Ebenezer, in having more sails set than she ought to have carried under the circumstances, and that she did not keep a good look-out.

This being the case set up in the act on petition by the party proceeding in the cause, it is obvious that the owners of The Ebenezer, the vessel proceeded against, must have been cognizant of the case which was made against them, because this act on petition, by the practice of the court, is invariably delivered to the opposing parties in the suit, to shape their \*defence accordingly. It [ \* 211 ] was, therefore, perfectly competent for the owners of The Ebenezer, in the present instance (had any such ground of defence existed,) to have said that the blame was imputable to The Concord in thus putting her helm hard a-lee; but no such charge is made upon the present occasion. I shall not, therefore, ask your opinion whether The Concord was to blame in so putting her helm a-lee, because it is not a point made in the case, although the counsel for The Ebenezer has adverted to it in the argument.

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The Ebenezer. 2 W. Rob.

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Let us now see how the case stands with respect to The Ebenezer, the vessel proceeded against. The principal blame imputed to her is, that she was carrying too great a press of sail under the circumstances of the case, "running with a fair wind, and having her square-sail, topmast studding-sail fore and aft, main-sail and gaff topsail set, and the said squaresail being very deep." Her course it appears was N. W., the wind being E. S. E., consequently she was free.

Now, gentlemen, this being the state of the case, you will not have to consider whether the measure adopted by The Concord, in putting her helm a-lee, was a right measure or not. With regard to the sails, which are admitted to have been set by The Ebenezer, I cannot pretend to form an opinion whether it was proper and justifiable or otherwise; but with respect to the night, I have no hesitation in expressing my conviction that it was very dark, and in this opinion I rely upon the evidence of James Mitchell, who, it is stated, belongs to the floating light vessel, distant about eight miles from the place where the collision took place, and who describes the night in the following terms: "that the density of the fog during the whole of the said last-mentioned time, which was the time of the collision, [ \* 212 ] was such as rendered it impossible for any object whatever being seen beyond the distance of 100 feet from the said light vessel."

Now, gentlemen, without pretending to ascertain whether at the time of the collision a vessel could be seen 100 feet or 70 feet off, a circumstance that must so entirely depend upon the size of the vessel and other circumstances, I apprehend that it may be safely taken for granted that the night in question was exceedingly dark and misty. This being so, it will be for you to consider and determine whether or no, under the circumstances, you are satisfied that The Ebenezer, in carrying the sail she is admitted to have carried, was under a greater press of sail than she ought to have been. I will only notice, in conclusion, that it is stated on behalf of The Ebenezer, as a reason for her carrying the sail she did, that a very large quantity of vessels were immediately in her wake, and that she carried the sail in question for the purpose of avoiding the possibility of any of the vessels running into her. This is a matter entirely for your consideration; and taking into your consideration all the circumstances of the case, you will oblige me by stating whether the collision in question was occasioned by the default of either and which of the vessels, or whether it is to be attributed solely and entirely to inevitable accident.

*Trinity Masters.* We are of opinion that The Concord did right

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The Ebenezer. 2 W. Rob.

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in not porting her helm immediately that she saw The Ebenezer, and under the circumstances of the case, particularly looking to the weather, that no blame attaches to The Ebenezer, but that the collision was the result of inevitable accident.

\* **PER CURIAM.** In that case I pronounce against the damage sued for. [ \* 213 ]

*Dr. Haggard.* With costs?

**PER CURIAM.** No; under the circumstances I am not inclined to give costs. I think there were a great many difficulties in the case which might fairly have misled both parties.

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LONDON PACKET,<sup>1</sup> Britt.

December 12, 1843.

The application of the Trinity House regulation with respect to two vessels meeting each other, the one upon the larboard and the other upon the starboard tack, depends upon the presumption that the two vessels are directly opposing each other, and is not intended to apply when the heads of the respective vessels are lying in different directions.

THIS was a cause of damage promoted by Robert Priest, of the port of Hull, and others, the owners of the vessel Hull, against the ship or vessel London Packet, her tackle, apparel, &c.

The circumstances of the case as set forth in the act on petition were to the following effect: it was stated, that at four o'clock, A. M. of the 1st of June last, the brig Hull, of the burden of 116 tons, sailed from Middlesboro', in the county of York, bound on a voyage to London, with a cargo of coals, and at seven A. M. arrived, in tow of a steam tug, at the fair-way buoy at the mouth of the river Tees, when the steam tug was cast off, the wind at such time being E. S. E. with light breezes. That upon the steam tug being cast off, the brig, in consequence of the head wind, stood to the northward on the starboard tack, and continued on such tack till noon, when she was tacked to the southward on the larboard tack, on which tack she remained until four o'clock P. M., when she was again tacked to the

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<sup>1</sup> [S. C. 2 Notes of Cases, 501.]



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The Ebenezer. 2 W. Rob.

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N. E. on the starboard tack, and continued upon such tack, until half-past seven P. M., when the wind gradually died away, so that at half-past eight she became wholly becalmed; and it being [ \* 214 ] \*ebb tide at the time, and also in consequence of the swell of the sea, the brig was thrown athwart the tide with her head to the N. and E., her helm being lashed a-lee. That she remained in this position until eleven P. M., when a light air having sprung up from the southward, her yards were braced sharp up on the starboard tack, her helm was put hard to starboard, and her head brought up the wind; but notwithstanding, the said brig, for want of sufficient wind, was still unmanageable. That about ten minutes past eleven, P. M., the night being clear, a schooner, which proved to be The London Packet, bound for Sunderland, in ballast trim, was seen by the watch on deck about a quarter of a mile off coming down upon her from the southward, with all her sail set, and bringing with her a breeze from the S. S. W. That the schooner was immediately hailed to keep clear of the brig, but she notwithstanding kept her course and ran aboard the said brig. That the damage was entirely occasioned by the neglect of the persons on board the schooner, and that the brig, by reason of the premises, could do nothing to avoid the collision, being still unmanageable, by reason of not answering her helm, and having her head sails shivering in the wind.

On behalf of The London Packet it was admitted — That she set sail from Rye upon the 28th of May, bound to Sunderland, with a cargo of oak plank and timber, and upon the 1st of June, about half-past eleven o'clock, she was crossing the mouth of the Tees, with the wind moderate from the S. W. by W., and all her sails set except the studding-sails. That the night was fine, but the weather was hazy, and no moon up. That I. B., the master, being upon [ \* 215 ] deck and upon the look-out, observed a brig, which \*proved to be The Hull, the vessel proceeding in the cause, a short distance off, on the larboard bow, the schooner standing a course N. N. W. half W. That the helm of the schooner was thereupon immediately put to port, and she bore away two points of the compass. That the helm of the brig was continued a-starboard, and she bore down upon the schooner with all sails set and full. That, as the two vessels neared each other, the helm of the schooner was put hard a-port, and so continued until the collision took place. That the master of the schooner hailed the brig to port her helm, but notwithstanding she continued to bear down upon the schooner, and that the accident was entirely imputable to the misconduct of the brig, in so keeping her helm a-starboard, &c.

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The London Packet. 2 W. Rob.

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The court was assisted by Trinity Masters,<sup>1</sup> and the case was argued by

*Addams and Robinson*, for The Hull.

*Haggard and Twiss*, for The London Packet.

PER CURIAM.

The learned judge having adverted in detail to the facts of the case as set forth in the pleadings, proceeded to address the Trinity Masters to the following effect: Now, gentlemen, I wish particularly to direct your attention to the statement of The Hull, the vessel proceeding in the cause, because you will be able to judge whether it is true in point of fact, and whether the measures adopted on the one side and on the other were the correct and proper measures to be pursued under the circumstances. The statement of The Hull is, that her yards were braced sharp up on the larboard tack, that her helm was put hard to starboard, with her head to the S. E.; and being in this position, the \*schooner, The London Packet, [ \*216 ] the vessel proceeded against, came down upon her with all her sails set, and with a breeze from the S. S. W.; it is also further stated, that at the period of the collision the breeze had not reached The Hull, and that in point of fact she was in an unmanageable condition, and could do nothing.

On the other side it was admitted that the wind at the time was S. W. and by W., and that the course of The London Packet was N. N. W. half W.; The London Packet therefore, you will perceive, had the wind in her favor. It is further admitted on behalf of The London Packet, that, perceiving the helm of the brig to be a-starboard, the helm of The London Packet was put to port, and the master of the schooner hailed the person on board The Hull to put her helm a-port likewise, but that she continued to starboard her helm, and came sheer on into the bows of the schooner.

Gentlemen, great reliance and much stress has been placed by the counsel for The London Packet upon the fact that the helm of that vessel was ported as stated, and a great deal has been said upon the rule laid down by the Trinity House with respect to vessels meeting each other, the one on the larboard, the other on the starboard tack.

Gentlemen, that rule has been recognized and adopted over and over again in this court, and I hope it will never be departed from in any case where it applies.

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<sup>1</sup> [Captain Locke and Captain Walker.]

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The Fortitude. 2 W. Rob.

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The question however arises, does this rule apply to the immediate circumstances of the case before us? In my humble judgment it does not, and for this reason, namely, that the application of the rule in question depends, I apprehend, upon the presumption that [ \*217 ] the two vessels are directly opposing each other, and is \*not intended to apply where the heads of the respective vessels are lying in different directions.

If therefore you believe the statement of The Hull, that she was lying with her head to the S. E., and that the course of The London Packet, as stated by herself, was N. N. W. half W., it is obvious that the two vessels, prior to the collision, were not approaching with their heads opposing each other.

If this be so, a different consideration applies with respect to the course pursued by The London Packet, whether she ought to have ported her helm or not. This point, gentlemen, I must refer to your nautical experience; and I will also request you to give me your opinion, whether the brig under the circumstances could have done any thing to avoid the accident.

The Trinity Masters were of opinion that The London Packet had a fair wind and commanded steerage way, and that had she continued her course instead of porting her helm, she would have passed to windward of the brig; that in attempting to cross the brig by porting her helm she did wrong, and brought about the collision.

Damage pronounced for.

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THE FORTITUDE.<sup>1</sup> Douglass.

December 20, 1843.

Construction of the third section of the statute 3 & 4 Vict. c. 65. The enabling power conferred upon the court by the statute does not extend to all questions arising out of a deed of mortgage, but is confined to the ship itself being mortgaged.

THIS was a cause civil and maritime, promoted by the mortgagees of forty-eight sixty-fourth parts or shares of the vessel, respecting certain claims of the said mortgagees under a deed of mortgage, bearing date 4th August, 1841.

It appeared that T. Humphreys, the owner of the forty-eight

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<sup>1</sup>. [S. C. 2 Notes of Cases, 515.]

sixty-fourth parts in question, having \*mortgaged his said [ \*218 ] shares to the mortgagees as a security for his banking transactions, the ship nevertheless remained in the possession and under the management of the owners, and in the month of October, 1841, sailed under the command of J. Douglass, also part owner, on a voyage from London to South Australia, and other parts in the China Seas, and back to England. During the voyage T. H., the mortgagor, became a bankrupt, and the ship returned to London with a valuable cargo on board, Douglass, the master, being at such time the only solvent owner of the said ship. The freight for the transportation of the cargo was duly paid by the consignees to Douglass, the master, who disposed of the larger portion thereof in the liquidation of his own wages as master, and the liabilities of the ship during the voyage. Upon the return of the ship, actions were commenced in this court for wages on behalf of the mariners, and these actions were still pending upon the 2d July, 1841, when a principal action was also entered on behalf of the mortgagees, claiming forty-eight sixty-fourth shares of the gross freight so paid into the master's hands.

The warrant as against the freight was executed by the arrest of the cargo, and bail was given on behalf of Douglass, the master, and the consignees of the cargo in the sum of 2,000*l*. An appearance to the action was also given on their behalf, under protest.

The act on petition in support of the protest, after setting forth the circumstances of the case as stated above, further alleged that, by an act of parliament of the 3 & 4 Vict. c. 65, intituled "An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England," it is by the third section of the said act enacted in the words following, \*to wit, "And be it en- [ \*219 ] acted, that after the passing of this act, whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into the registry of the said court, in either such case the said court shall have free jurisdiction to take cognizance of all claims and causes of action of any persons in respect of any mortgage of such ship or vessel, and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively;" and that by the fourth section of the said act it is further enacted in the words following, "And be it enacted, that the said Court of Admiralty shall have jurisdiction to decide all questions as to the title or ownership of any such ship or vessel, or the proceeds thereof remaining in the registry owing in any cause of possession, salvage, damage, wages or bottomry, which shall be instituted

in the said court after the passing of this act ;" that the jurisdiction given to the Court of Admiralty by the said two sections of the act in respect to the claims of mortgagees is confined to the ownership of any ship or vessel, or the proceeds thereof ; and that no jurisdiction whatever is given to the said court to adjudicate upon the title or ownership of mortgagees to the freight or earnings of any ship or vessel, much less to permit mortgagees to commence a principal action in the said court against the freight or earnings of any ship or vessel ; that the action in this case, so far as regards the freight, is a principal action, the actions at the suit of the mariners being against the ship only. That said J. D., as the only solvent owner and master of the said ship, was the only person legally entitled to receive the [ \* 220 ] said freight, and, after \* payment thereof of the liabilities thereupon, to pay over to the proper persons entitled to receive the same their proper proportions of the residue of the said freight. Wherefore the proctor of the said J. D., &c., prayed the judge, to pronounce for his protest, and to dismiss his parties, and the bail given on their behalf, from all further observance of justice, &c.

In behalf of the mortgagees, it was pleaded, in answer to this act on petition, that at the time the action was entered in the cause, the vessel was under the above arrest of the court at the suit of the mariners, and that such arrest was a sufficient foundation for the court's authority to entertain this action, under the provisions of the third section of the act 3 & 4 Vict. ; that the construction of this section was altogether irrespective and independent of any connection with the fourth section of the said act. Wherefore the proctor, &c.

The question was argued by

*Addams and Bayford*, for the mortgagees.

*Haggard and Curteis*, in support of the protest.

#### JUDGMENT.

DR. LUSHINGTON. This vessel was originally arrested in a suit for mariners' wages. Whilst under the arrest of the court, a warrant was extracted against the ship and freight at the instance of Messrs. Pease and Co., the mortgagees of forty-eight sixty-fourth shares in the ship, and this warrant was executed by the arrest of the cargo. An appearance under protest having been given on behalf of Douglass, the master and part owner, and of the consignees of the cargo, an act on petition was brought in stating to the following effect.

[Court here adverted to the contents of the act on petition, [ \* 221 ] \* and proceeded to observe]—The question then, it ap-

pears, is confined to a simple question of jurisdiction. If the court possesses a jurisdiction, it is bound to exercise it, however great may be the difficulty and complexity of the questions which may arise; if it has no jurisdiction, even a failure of justice consequent thereupon would not authorize the court to interfere in the matter. In the course of the observations which have been addressed to the court by the learned counsel at the bar, the learned counsel have founded their arguments principally upon the act of parliament, 3 & 4 Vict. c. 65; and in the course of those arguments, two cases were cited, namely, *The Percy*,<sup>1</sup> reported in the third volume of Dr. Haggard's Reports; and *The Dowthorpe*, which I myself decided. I will now proceed to notice the cases which have been so cited, before I address myself to the more immediate consideration of the statute in question. With respect to *The Percy*, which was decided by a very learned judge, Sir John Nicholl, I still adhere to the opinion which I expressed in delivering my judgment in the case of *The Dowthorpe*,<sup>2</sup> namely, that the decision of Sir John Nicholl cannot be considered to extend beyond the circumstances of the case itself. I have again read over and examined the judgment in that case, and upon further consideration I am strongly inclined to think that the true difficulties of the case were not brought under the consideration of the learned judge, whose decision militates against the decision of Lord Stowell in the case of *The Prince Regent*.<sup>3</sup> With respect to *The Dowthorpe*, which came under my own consideration, it is to be observed that in that case there was a suit upon a bond of bottomry, and also actions for wages and pilotage.

The ship and freight, therefore, in the case of *The Dowthorpe*, \* were under the jurisdiction and control of the court [ \*222 ] in ordinary course, without reference to any statute. This is an important circumstance, and furnishes a material distinction between the case of *The Dowthorpe* and the present case, in which the freight has not been arrested, in the primary action at the suit of the mariners, as in ordinary course by persons claiming a lien thereon; but an action has been brought by the mortgagees of certain shares of the ship against both the ship and freight. That the parties so proceeding have a right to proceed against the ship or proceeds, is not denied; the question is with respect to the arrest of the freight in the present instance, as alleged in virtue of the statute. I must now refer to the statute 3 & 4 of Vict. Prior to the passing of this statute, it was more than doubted in this court whether, in cases

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<sup>1</sup> [3 Hagg. Ad. R. 402.]<sup>2</sup> [2 W. Rob. 73.]<sup>3</sup> [Not reported.]



where a ship had been arrested under the jurisdiction of the court, the court could take cognizance of the claims of mortgagees, or of any questions of title to the ship itself. In order to obviate this state of things, so detrimental to justice, the statute 3 & 4 Vict. was enacted. The intention of the legislature in passing this statute, I conceive, was, that the remedy should be commensurate with the evil. It was not, I apprehend, intended to confer any new, separate, and distinct powers on this court, but merely to enable the court to exercise its ordinary jurisdiction to the full extent. Now what are the provisions of the 3d and 4th sections of this statute? They are as follows: (Court read the 3d and 4th sections.) In the course of the argument it has been contended by the counsel for Mr. Douglas, the part owner, that these two sections are to be taken together, and that

the question before the court must be governed by the construction of the two sections in connection. My opinion,

I confess, does not agree with this argument; in my judgment the question solely and entirely depends upon the third section alone. Two conflicting constructions have been put upon the meaning of this section. The counsel for the mortgagees taking out the warrant have argued that the vessel having been arrested, and this being a question arising out of a deed of mortgage, the court has ample jurisdiction under this section to take cognizance of all claims and causes of action of any person in respect of any mortgage of a vessel, and to decide any suit instituted by any such person. The counsel for the part owner, on the other hand, contend that the jurisdiction conferred upon the court is not as to any question arising out of a deed of mortgage, but as to the ship itself being mortgaged. My own judgment, I must say, inclines to the latter construction, as it more nearly assimilates to the purposes for which the act was passed, namely, that it was intended as a remedial act, and to obviate certain evils, and no further. The question then arises, whether the circumstances of the present case bring it within the principle of the remedy, or within a fair construction of the words of the act of parliament. I conceive that they do not. Not within the principle, because, under the circumstances of the case, the court can exercise its ordinary functions with justice without referring to the statute; not within the words of the act, because, in my view of it, it was the intention of the legislature to extend the enabling power of the court to the ship alone. In the case of *The Dowthorpe* I have already observed the question was forced upon the court by the circumstance that the

freight was under the control of the court in the ordinary course of its jurisdiction, and by virtue of its ordinary process. The case of *The Dowthrope*, therefore, is very different

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The Speed. 2 W. Rob.

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from the present case, which is not a proceeding to make freight contributable to liens *pari passu* with the ship, but to bring under adjudication the title to the freight itself, irrespective of any other question. I am therefore disposed to pronounce in favor of the protest in the present instance, and in so doing I wish it to be most distinctly understood that I do not intend my decision in the least degree to affect the question as to the right and power of the court to call upon the holders of freight to bring it in to bear its proportion of liens imposed by the law, when such a proceeding is necessary for the purposes of justice, and where in the original case the court has clearly jurisdiction. I wish it also to be further understood that my decision in this case does not forestall any question as to the payment of the proceeds of the ship, nor the question as to whether out of the existing proceeds the court shall not so deal with them as to make the sixteen sixty-fourth shares of Captain Douglass liable to discharge the wages not only *pari passu* with Messrs. Pease's forty-eight sixty-fourth shares, but also to bear, as far as wages are concerned, that share of the burden which the freight in equity ought to bear. I leave all these questions wholly untouched by my present judgment, and determine nothing but the point of law which has been raised under the peculiar circumstances of the present case. I pronounce in favor of the protest.

*Dr. Haggard* applied for the costs.

PER CURIAM.

The whole course of decisions upon the subject of costs, has gone upon the principle of not giving costs \* where the [ \* 225 ] law is exceedingly difficult, or the question is a question *primæ impressionis*. I must therefore decline giving costs.

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THE SPEED, Ellis.

January 12, 1844.

Collision in the river St. Lawrence. A vessel with the wind free not giving way to a vessel sailing by the wind, condemned in the damage. Practice of the court in taking the opinion of the Trinity Masters in cases of damage by collision.

THIS cause of collision, promoted by G. Marshall, the sole owner

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The Speed. 2 W. Rob.

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of the bark *Thames*, against the vessel, *The Speed*, belonging to St. John's, New Brunswick. A cross action was also entered on behalf of the owners of *The Speed*, and the court was assisted, at the hearing of the cause, by the Trinity Masters.

On behalf of *The Thames* it was pleaded, that about 10 P. M., 5th October, 1842, *The Thames* was proceeding up the St. Lawrence, close hauled on the starboard tack, the wind blowing N. W. to N. W. by N., and *The Thames* heading W. by S. to W. S. W., and the night being moderately clear, when a large vessel was observed steering towards her with a free wind by four points, and being distant about 150 yards, and on her starboard bow. That immediately thereupon the crew and pilot on board *The Thames* shouted out to her to keep her luff, which she might have done by starboarding her helm, but that no reply was made to such hailing by any one on board *The Speed*, and, when perceived, her crew, apparently confused, put her helm hard a-port, which caused *The Speed* to strike *The Thames* with tremendous force upon the after part of the starboard main rigging, and doing the damage in question.

[ \* 226 ] The case set up on behalf of *The Speed* alleged \* that she was proceeding upon the night in question down the St. Lawrence, close hauled on the larboard tack, the wind being N. by E. That nearly all hands were on deck, when one of the crew forward sung out that a vessel was ahead, and which was then seen nearly right ahead, but a little on the larboard bow. That *The Speed's* helm was immediately put to port, when the ship, which before had been close by the wind, and her sail a little shivering, answered her helm directly, and bore away two or three points from the wind. That whilst she was so bearing away, *The Thames* came more distinctly into view on the larboard or weather side, and appeared as if coming down upon and about to run into *The Speed*. That the pilot on board *The Speed* thereupon called to *The Thames* to put her helm to port, and immediately ordered *The Speed's* helm to be put hard a-starboard, as she was then hailed to do by the persons on board *The Thames*. That the ship answered her helm, and came up to the wind with her sails aback, but almost immediately afterwards the two vessels came into collision with each other.

The case was argued by *Queen's Advocate* and *Haggard*, for the owners of *The Speed*.

*Addams* and *Bayford*, for the owner of *The Thames*.

## PER CURIAM.

The circumstances of this case have been most fully and laboriously discussed by the counsel employed in the cause, and I apprehend that every argument which ingenuity could suggest has been already offered to the court's consideration. It will therefore, \*gentlemen, be unnecessary for me to trouble you with any [ \* 227 ] lengthened observations upon the present occasion. There are certain facts which are admitted in the case, and I will first refer you to these facts, and then direct your attention to those points which have been made the subject of argument as doubtful in the cause. It is admitted that at the time of the collision, The Thames was going up the river to Quebec, laden with coals and glass, and that The Speed was coming down the river with a cargo of timber. It is also admitted that The Thames was upon the starboard tack, and The Speed was on the larboard tack with the tide in her favor. Another admitted fact in the case is, that The Speed, on discovering The Thames, put her helm a-port, but afterwards to starboard. Whether The Thames kept her course or not has not been called in question either directly or indirectly in the pleadings. The only evidence to show that The Thames did anything to alter her course is to be found in the affidavit of a seaman of the name of Moffatt, who was on board The Thames, and has now been produced as a witness for the owners of The Speed. He says that he himself put the helm of The Thames hard a-starboard, but without orders. It is to be observed that this statement comes out as it were by surprise upon the owners of the vessel proceeding in the cause, because no averment of the kind is mentioned in the pleadings, and consequently the owners of The Thames have had no opportunity of contradicting it if it were material to the issue in the cause. I therefore advise you to leave this affidavit out of your consideration; and I further take upon myself the responsibility of stating to you, that as no averment is to be found in the act on petition, or in \*the answer on behalf [ \* 228 ] of The Speed, that The Thames did any thing to alter her course, you must consider that she kept it, and did not either starboard or port her helm. I now come to the controverted part of the case, and the main and most important fact in a dispute between the parties is from what quarter the wind blew. On the part of The Thames it is stated to have been from N.W. by W.; on the part of The Speed it is averred to have been N. by E.—certainly a very considerable variation. As regards the evidence, it is undoubtedly true that the witnesses who swear that the wind was N. by E. as alleged on behalf of The Speed, in point of number outweigh those who depose to the contrary. I am not however prepared to say that

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The Speed. 2 W. Rob.

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a question of this description is at all times to be decided by the number of the witnesses upon the one side or the other. We must necessarily look to the character and *status* of the persons who give the evidence, and also to the probabilities of the statements they are produced to support. In the present instance, you will observe, there is the evidence of the master, the mate, the pilot, and one or two other persons on the one side, opposed to the contrary testimony of a number of the common mariners. Under this state of circumstances, it will be for you, gentlemen, to consider whether from your nautical skill and experience you can extract from the admitted facts in the case what is the probability as to the quarter from which the wind was blowing. If you are not enabled to form any opinion upon the matter with satisfaction to your own minds, you will have the goodness to tell me, because in that case it may be that neither party would be entitled to say that they had legally established [ \* 229 ] their case. There is another disputed \*fact upon which considerable discussion has taken place, and to which I would briefly direct your attention in conclusion of my observations, namely, from what quarter The Thames was seen from on board The Speed when the two vessels were first approaching each other. It is alleged on the part of The Speed, that The Thames was observed approaching almost head on, but a little to the larboard side; whilst on the part of The Thames it is stated that The Speed was coming with her starboard bow upon her. Notwithstanding the attention which I have paid to the argument of the learned counsel, I confess that I am myself wholly unable to discover upon which side the truth lies, and this part of the case, therefore, I must leave to your practical skill and experience, requesting that you will take the whole circumstances of the case into your consideration, and have the goodness to inform me whether you think the case is so involved in difficulty and doubt that no satisfactory judgment can be formed, or whether you think that blame is attributable to both or either of the parties in the suit.

*Trinity Masters.* We are of opinion that the vessel sailing from Quebec had a fair wind in her favor. We see nothing in the evidence to induce us to conclude otherwise; and it being the received rule that vessels having the wind free should get out of the way of vessels sailing by the wind, we exonerate The Thames and pronounce The Speed to have been in fault in the present instance.

The COURT pronounced for the damages and costs of The Thames, and dismissed the action promoted on behalf of The Speed.

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The Speed. 2 W. Rob.

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\* An application was made upon motion to the court to [ \* 230 ] admit the introduction of two affidavits, which had been sworn after the act had been closed and the proofs had been exchanged between the respective proctors in the cause. The motion was opposed upon the ground that the affidavits in question were sworn too late and contained a vast deal of irrelevant matter; (and it was urged as an especial ground for opposing their admission) that they would be laid together with the other papers in the cause, before the Trinity House Board prior to the argument, and that the Trinity Masters might come to the hearing of the cause with their minds in some degree biased by the perusal of such irrelevant matter.

The COURT, in overruling the objection, observed to the following effect — It has been said that there is a particular reason for opposing the introduction of these affidavits, inasmuch that an application will be made to have the case argued before Trinity Masters, and it is important to prevent the irrelevant facts from coming before them. In other words, it is apprehended that those gentlemen might have an unfavorable impression made upon their mind *ex parte*, which it would be impossible afterwards to remove. This apprehension is obviously founded upon a mistaken conception of the course pursued by the Trinity Masters in these cases, namely, that they give their opinion solely and entirely upon their own view of the case. Now I wish it to be understood, and it is desirable that it should be known, that this is not the fact. In the case disposed of this morning, the Trinity Masters entertained no doubt as to the conclusion to which they should come; and although I did not \*call upon them to state their reasons publicly, which it [ \* 231 ] would be no easy matter for gentlemen to do who have been employed all their lives in nautical pursuits, yet they stated their reasons to me, in order that I might see whether the facts they assumed as the ground of their opinion were in accordance with the evidence in the cause. In all these questions it is the endeavor of the court to understand as far as possible the grounds upon which the opinion of the gentlemen from the Trinity House is formed, and if unfortunately in any case I thought that they were acting erroneously, it would be my duty to differ from them.



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The King William. 2 W. Rob.

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THE KING WILLIAM,<sup>1</sup> Smith.

January 23, 1844.

Construction of the statute 5 &amp; 6 Will. 4, c. 19, ss. 15, 16.

Court of Admiralty not authorized to entertain a suit for wages where the claim is under 20*l.*, unless it is apparent that under the circumstances of the case, justice would not be efficiently administered by proceedings before a magistrate.

IN this case a summary petition was brought in on behalf of Daniel Grace, a mariner, claiming the sum of 16*l.* 10*s.* 4*d.*, as the balance of wages due to him for services performed on board this vessel.

The petition in substance set forth, that the mariner was hired in the month of October, 1842, for a voyage from the port of London to Hobart Town, Van Diemen's Land, and to any port or ports in the Eastern seas, and back to the port of London or other port of discharge in the United Kingdom. That the said mariner sailed with the vessel and arrived at Hobart Town in the month of February, 1843, and in July of the said year she sailed for Batavia, upon her return voyage to England, and arrived at Falmouth upon the 3d of November following. That shortly after her arrival at Falmouth, the master of the said vessel signified to the crew his intention [ \* 232 ] of proceeding \*to Gottenburg in Sweden, whereupon the said D. Grace and others of the crew stated, that under the articles their engagement was terminated, and upon that account declined to accompany the ship to Gottenburg. That a complaint was preferred by the master against the said D. G. and others of the crew before the magistrates at Falmouth, and upon the hearing thereof the magistrates decided that the voyage was ended, and ordered the discharge of such of the crew as desired it, and that their clothes should be given up to them. That repeated applications have been made to the owner of the said vessel for the payment of the said wages, &c. &c. &c.

No opposition was offered to the admission of this summary petition on the part of the owners, nor was the payment of the wages in question contested on their behalf. It was, however, submitted, that under the provisions of the statute 5 & 6 Will. 4, c. 19, s. 15, the claim for wages being under the sum of 20*l.*, the mariner was bound to have brought his action before the magistrates at Falmouth, and

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<sup>1</sup> [S. C. 3 Notes of Cases, 14.]

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The King William. 2 W. Rob.

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that by proceeding in the Court of Admiralty he had forfeited his right to costs, under the 16th section of the act.

For the owners, *Haggard*.

For the mariner, *Addams*.

PER CURIAM.

Dr. LUSHINGTON. The question in this case arises upon the construction of the 16th section of the act of parliament, 5 & 6 Will. 4, c. 19.

It is, I believe, the first time this court has been called upon to pronounce any opinion upon it, and looking to the terms in which the section is drawn up, I must confess that I feel no little difficulty in \*ascertaining what was the precise meaning of [ \* 233 ] the legislature in framing it. The statute in question, after providing in the 15th section a remedy for the delay and expense which formerly attended the enforcing payment of mariners' wages, in the 16th section enacts, in the following words<sup>1</sup> — [Court having

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<sup>1</sup> By the 15th section it is provided, "that in all cases of wages not exceeding twenty pounds, which shall be due and payable to a seaman for his service in any ship as aforesaid, it shall be lawful for any justice of the peace in any part of his Majesty's dominions, residing near to the place where the ship shall have ended her voyage, cleared at the custom-house or discharged her cargo, or near to the place where the master or owner, upon whom respectively the claim is made, shall be or reside, upon complaint on oath, to be made to such justice by any such seaman or on his behalf, to summon such master or owner to appear before him to answer such complaint, and upon the appearance of such master or owner, or in default thereof, on due proof of his having been so summoned, such justice is hereby empowered to examine upon the oath of the parties and their respective witnesses, touching the complaint and the amount of wages due, and to make such order for the payment thereof as shall to such justice appear reasonable and just;" and in case such order shall not be obeyed within two days next after the making thereof, it shall be lawful for such justice to issue his warrant to levy the amount of the wages awarded to be due by distress and sale of the goods and chattels of the party on whom such order for payment shall be made, rendering to such party the overplus, if any shall remain, of the produce of the sale, after deducting thereout all the charges and expenses incurred by the seaman in the making and hearing of his complaint, as well as those incurred by the distress and levy and in the enforcement of the justice's order, &c."

The 15th section in conclusion provides, "that in case sufficient distress cannot be found, it shall be lawful for the said justice to cause the amount of the said wages and expenses to be levied upon the ship in respect of the service on board which the wages are claimed, and the tackle and apparel thereof; and if such ship shall not be within the jurisdiction of such justice, then he is hereby empowered to cause the party upon whom the order shall be made, to be apprehended and committed to the common jail of the county, &c. &c."

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The King William. 2 W. Rob.

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[ \* 234 ] \*read the words of the 16th section, proceeded to observe] —

Now, what is the meaning of these two sections of the act in question? In the 15th section it is perfectly clear that the object of the legislature was to give a remedy against the delay and expense which heretofore attended the proceedings in this class of cases, and this remedy was to be supplied, not by arresting the ship in the first instance, but by a personal proceeding against the master or owner before a justice of the peace. Thus far the scope and intention of the statute is perfectly intelligible. With regard to the 16th section, however, ambiguity arises upon the words “might have had as effectual a remedy for the recovery of his wages by a complaint to a justice of the peace;” the meaning of these words, I confess, I cannot so easily understand. Nothing is said of the difficulties which may attend a case brought before the magistrate under the provisions of the act. The words are simply “as effectual a remedy,” by which I presume is intended as effectual a remedy as the process of this court could enforce. Can it be the construction of this section

of the act that this court shall certify against the plaintiff's [ \* 235 ] costs \* only in cases where difficulty occurs? If it be, I cannot see the reason of it; and I should feel considerable hesitation in coming to any such conclusion with respect to the intention of the legislature. I conceive that the best and most rational interpretation which I can put upon the 16th section of the act is, “that it was the intention of the legislature that the Court of Admiralty should not entertain a suit for mariners' wages where the claim set up is under 20*l.*, unless it is apparent upon a view of all the circumstances of the case that justice could not be fully and efficiently administered by a magistrate.” The question then arises, how far the circumstances of the case bring it within this interpretation? Different constructions, it appears, have been put upon the mariner's contract; and it is obvious that when the master of the vessel resorted to forcible measures to compel the crew to proceed with the ship from Falmouth to Gottenburg, he did so under the impression that he was legally justified in so doing; it is also equally obvious that the owners

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The 16th section enacts, “that if any suit for the recovery of a seaman's wages shall be instituted against the ship, or the master or owner thereof, either in the High Court of Admiralty or in any Vice-Admiralty Court, or against the master or owner in any Court of Record in his Majesty's dominions, and it shall appear to the judge in the course of such suit that the plaintiff might have had as effectual a remedy for the recovery of his wages by complaint to a justice of the peace as hereinbefore provided, then and in every such case it shall be lawful for such judge, and he is hereby required, to certify to that effect, and thereupon no costs of suit shall be awarded to the plaintiff.”

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The Itinerant. 2 W. Rob.

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in thus far resisting the payment of the wages have been actuated by the same consideration. Even the magistrates at Falmouth, so far as I can take the statement without evidence, seem to have been in doubt, for they ordered the discharge of the crew, and directed their clothes to be given up, but said nothing as to the wages. Under the circumstances of the case, then, although I must confess that I see no difficulty whatever in the construction of the articles, and it does not appear to me that any question of law arises upon them, yet I think that I should do an injustice to the mariner if I refused him his costs.

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\* THE ITINERANT,<sup>1</sup> Russell.

[ \* 236 ]

January 23, 1844.

A vessel sailing upon a foggy night, with all her sails set excepting her foretop gallant sail, dismissed upon the ground of inevitable accident.<sup>2</sup>

Practice of the court is, not to give costs on either side where a collision has occurred from inevitable accident.

THIS was a cause of damage by collision, promoted by the owners of the schooner *Isabella*, against this vessel, her tackle, &c., &c., &c.

On behalf of *The Isabella* it was stated, in the act on petition, that upon the 19th of May she sailed from Newcastle, laden with coals, and bound to Mundesley, in Norfolk; and about one o'clock, A. M., of the 23d of the said month, the wind, which had previously been to the eastward, varied to about S. E., and the said schooner, which had been laying larboard tacked S. and by E., fell off and lay larboard tacked S. and by W., close to the wind, being then about twenty miles to the southward of Flamborough Head, the wind blowing a fresh breeze, and the weather being thick and foggy; that R. N., who had the watch on deck, kept the fog-horn from time to time constantly sounding, and which signal was answered by two vessels in company, one to windward and the other to leeward of the said schooner; that at half-past two, A. M., of said day, R. N., having first sounded the fog-horn, went below into the cabin to see what time it was, which he had no sooner done than one of the crew, who was at the helm, observed a large brig of 220 tons, which

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<sup>1</sup> [S. C. 3 Notes of Cases. 5.]

<sup>2</sup> [See *The Virgil*, 2 W. Rob. 201.]

afterwards proved to be The Itinerant, coming down in ballast before the wind; that the course of the schooner was kept steady by the wind, under the supposition that the said brig would, as it was her duty, pass to leeward, or otherwise give way; and the crew of the brig were hailed repeatedly so to give way, by the persons on board the schooner, but no answer was returned, neither was the course of

the brig in any degree altered, in consequence whereof she [ \* 237 ] came into collision with The Isabella, striking her \* on the

larboard bow, and cutting her down to the water's edge, and the said schooner shortly afterwards sunk; that the said brig had her topmast and lower studding sails set on her starboard side, and her foresail, foretopsail, foretop gallant sail, square mainsail, main topsail, maintop gallant sail, main royal, and fore and aft mainsail set; that the loss of the said schooner was entirely imputable to the said brig Itinerant, and those on board her, in not altering her course and not giving way, as it was her duty to have done under the circumstances; wherefore, &c., &c.

In the reply of the owners of The Itinerant it was, in substance, alleged that the wind was E. S. E., and not S. E., and the night extremely foggy, and that a good look out was kept on board The Itinerant, W. D. and H. S. being stationed on the forecastle on the look-out, and C. S., the mate, being on the main deck, and G. S. having charge of the helm; that The Itinerant was sailing only at the rate of three knots an hour, her course being N., and on the starboard tack, having the wind two points abaft her beam; that shortly previous to the collision the fog had become so intensely thick, that it was utterly impossible to discern a vessel at the distance of from nine to ten yards; that after the weather became foggy, and until the time of the said collision, the crew of The Itinerant constantly kept a good look-out, and used every precaution to prevent accident, but that, for the space of half an hour before the collision occurred, they heard no sound from any fog-horn save their own; neither was there, nor could there have been, any hallooing on board The Isabella previous to the said collision; that The Isabella, at the time of the collision, was larboard tack, and laying S. and not S. by W.,

the wind, as aforesaid, being E. S. E.; that it was impos- [ \* 238 ] sible for \* The Itinerant to give way to the schooner, or to

alter her course, as it is alleged she ought to have done, for that the intensity of the fog prevented her crew, though keeping an anxious look-out, from even seeing The Isabella, till the two vessels were in contact with each other; that, by reason of the premises, the said collision was altogether an unavoidable accident, and to be attributed solely to the state of the weather, and which rendered

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The Itinerant. 2 W. Rob.

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all the care and precaution taken by The Itinerant unavailing ; wherefore, &c., &c.

The cause was argued before Trinity Masters,<sup>1</sup> by

*Addams* and *H. Nicholl*, for The *Isabella*.

*Queen's Advocate* and *Bayford*, for The *Itinerant*.

PER CURIAM.

I have observed, with much regret, that very many causes of collision, involving great destruction of property, and a probable loss of human life, have recently been brought under the consideration of this court. Questions of this kind, I lament to say, have been increasing in number ; and as it is most desirable that our decisions should be, as far as possible, of such a nature as to induce masters, mates, and mariners to adhere to the rules which you have laid down, and the right principles of navigation, I must address a few observations to you, gentlemen, notwithstanding the attention you have paid to the arguments of counsel, and the care you have taken, by reading the papers in the cause, to make yourselves acquainted with the facts of the case.

With respect to the place where the collision occurred in the present action, there is no material discrepancy in the respective statements before the court. On the part of The *Itinerant*, it is stated to \*have taken place at sea, the high land of Fram- [\* 239 ] lington bearing S. W., distant about eighteen or twenty miles. On the part of The *Isabella*, the vessel proceeding in the cause, it is averred that the accident occurred about twenty miles southward of Flamborough Head. Both of these accounts, you will perceive, are sufficiently consistent to render it unnecessary to fix with greater precision the locality of the accident. With respect to the wind, there is a somewhat greater discrepancy in the two statements. On the part of The *Isabella*, it is represented as blowing from the south-east ; on the part of The *Itinerant*, that it was E. S. E., making, as regards the wind, a difference of two points in the respective statements. Now, gentlemen, it occurs to me that whether the wind was S. E. or E. S. E., the difference in the two statements to which I have adverted could not materially affect the conduct which ought to have been pursued by The *Itinerant*, under the circumstances of the present case. Let us then consider, in the

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<sup>1</sup> [Captain Welbank and Captain Madden.]



first place, the conduct pursued by that vessel, which is the vessel charged with having caused the collision.

It is stated, on her behalf, that she kept a good look-out, but that it was utterly impossible to distinguish, in consequence of the foggi-ness of the night, The Isabella, a vessel of only seventy-one tons burden, before the collision actually took place. The defence, there-fore, which is set up on behalf of The Itinerant is a case of inevita-ble accident, arising from an act of Providence, namely, the state of the weather. Now, as far as I am able to form a judgment upon the point, I see no reason to discredit the averment that a good look-out was kept on board The Itinerant; because it is distinctly sworn

in the evidence that she had four persons upon deck at the [ \* 240 ] time, two of whom \* were stationed upon the forecastle, one at the helm, and one amidships. Again, with respect to the state of the weather, I think it is fairly to be collected, from the evi-dence in the cause, that the weather at the time was, as stated, thick and foggy; and I here would observe to you that, although the state-ment of The Itinerant may, as regards the state of the weather, be true, yet the owners of that vessel may, nevertheless, be to blame, if the master and crew did not adopt all those measures which it was in their power to have adopted for the purpose of avoiding the colli-sion. How far it was or was not possible for them, under the cir-cumstances, to have avoided such collision, is the more immediate part for your consideration upon the present occasion. And this leads me to direct your attention to another important circumstance in the case, — I mean the speed at which The Itinerant was pro-ceeding at the time. With regard to her actual rate of sailing, there is, undoubtedly, a difference in the evidence. One fact, however, is not denied or disputed, namely that she was proceeding at the time with all her sails set, excepting her foretop gallant sail. The carry-ing so great a press of sail has been justified by the counsel for The Itinerant, in the course of their argument, by the suggestion that The Itinerant was going against the tide, and that it was essential for her preservation that she should make the best headway she could, to avoid being run into by other vessels which were following in her wake. It has also been asserted that her actual rate of sailing at the time was not more than three knots an hour. Such being the statement set up on behalf of The Itinerant, it will be for you, gen-tlemen, upon this representation, to determine, in the first instance, what was the real state of the tide, and what the probable [ \* 241 ] \* rate of The Itinerant's speed; and then, secondly, you will have the kindness to inform me whether that speed was or was not too great, considering that she was navigating upon

a dark and foggy night, and in a track where she was likely to encounter other vessels.

I will now, before I conclude my observations, very briefly direct your attention to the statement which is set up on behalf of The Isabella. Her case is to this effect, that being on the larboard tack, with the wind S. E. and her head S. by W., Broughton, the man at the helm, discovered The Itinerant, and that he so made the discovery only a minute before the collision took place. It is not denied that the master of The Isabella was at such time not upon deck, but below; indeed, it is admitted by the master himself in his affidavit that he so went below to look at his watch. Now it appears to me that a question of great importance as affecting the issue in this cause arises upon this part of the case. The crew of The Isabella, it is admitted, consisted of five persons, and of those persons only one, namely, the man at the helm, was on deck when The Itinerant was first observed approaching towards The Isabella. The night, it is to be remembered, was dark and foggy. Was it then, I ask, right on the part of The Isabella to be sailing at any time upon such a night with only one man upon deck? If the man at the helm could have seen The Itinerant one minute before the collision took place, a man on the fore-castle, it occurs to me, might by possibility have seen her two or three minutes. This, gentlemen, will be an important point for your consideration; and the questions which I have now to put to you are these:—first, was The Itinerant solely to blame? secondly, was The Isabella in any degree in fault? and lastly, was [ \*242 ] the collision entirely the result of inevitable accident? As I have already stated in the commencement of my observations, several similar cases have recently occurred in this court. In the course of the argument, it has been urged that in some of the cases the court has laid down certain principles of general application to all questions of this description. This is rather a misapprehension of what fell from the court in those cases. It is undoubtedly most desirable that there should be uniformity of decision and uniformity of principle in all the cases as far as is practicable; and feeling the importance of this, I have upon former occasions endeavored to explain as clearly as I could the opinions which have been delivered, and the rules which have been adopted by the Trinity House Board for the government of masters of vessels. At the same time I never intended to lay down any general principles, but with reference to the circumstances of each case, whatever those circumstances might be. The circumstances of each case differ so much, that no man would be bold enough to lay down any principle of universal application; and although certain general rules for the government of vessels may be

extracted from the observations which have been heretofore laid down in this court, the application of those rules, under the circumstances of each particular case, must be matter of nautical skill, and not of judicial determination.

Gentlemen, that we may decide the present case with satisfaction to the public as well as to ourselves, I suggest that we retire and consult together upon the proper decision to be made in this case.

After a short absence with the Trinity Masters in the [ \* 243 ] inner hall, the learned judge stated that, as there \* were certain difficulties in the case which demanded further consideration, he would postpone his decision till the first day of term.

Upon the 23d of January, the court pronounced that the collision was the result of inevitable accident; and in delivering his judgment, the learned judge observed, "The real difficulty in the case which induced the court and the gentlemen from the Trinity House to take time for further deliberation has arisen from the press of sail which The Itinerant is represented to have carried under the circumstances of the case. It is unquestionably the duty of every master of a ship, whether in an intense fog or great darkness, to exercise the utmost vigilance, and to put his vessel under command so as to secure the best chance of avoiding all accidents, even though such precautions may occasion some delay in the prosecution of the voyage. It may be that for such a purpose it would be his duty to take in his studding sails; but such is the constantly varying combination of circumstances arising from locality, wind, tide, number of vessels in the track, and other considerations, that the court cannot venture to lay down any general rule which would absolutely apply in all cases. In the present instance, the opinion of the court is, that it might have been prudent for The Itinerant to have taken in her studding sails; but the court is also of opinion, and so were the gentlemen by whom it was assisted at the hearing of this case, that the collision was not occasioned by the omission of The Itinerant so to do, but that the state of the weather was such that the accident would have occurred, even although this precaution had been adopted." •

Suit dismissed.<sup>1</sup>

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<sup>1</sup> [In the case of The Colonia, decided the same day, with Trinity Masters, — which was a cross-action between that vessel and The Susan, (two brigs,) for a collision off Folkstone, on the 4th October, in daylight, the weather fair, the court, with reference to the duty of vessels to take Trinity precautions, observed:—"The whole evidence shows that it was the duty of The Colonia, with the wind free, to have made certain of avoiding The Susan; she did not do so, but kept her course till she was at so short a

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The Mary Stewart. 2 W. Rob.

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\**Queen's Advocate*, on behalf of the owners of The Itine- [ \*244 ] rant, prayed for costs; but the court declined to give them, upon the ground that the course of practice had been not to give costs on either side where a collision had occurred from inevitable accident.

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THE MARY STEWART.

January 31, 1844.

In cases of collision, where the evidence on both sides is conflicting and nicely balanced, the court will be guided by the probabilities of the respective cases which are set up; *à priori* the presumption is that the master of a vessel would do what was right and follow the regular and correct course of navigation.

THIS was a case of collision under the circumstances noticed in the observations of the court. The court was assisted by Trinity Masters.

For The Juno, *Dr. Addams*.

For The Mary Stewart, *Dr. Haggard*.

PER CURIAM.

Gentlemen, it is not necessary that I should trouble you with many observations upon the present case. The collision in question took place off the jetty, at Yarmouth, in the month of June last; and at the time of the accident, The Mary Stewart, the vessel proceeded against, was on her voyage from Hartlepool to London, laden with a cargo of coals; and The Juno, also coal laden, was proceeding in company with other collier vessels from Hartlepool to London. It appears that shortly before the collision occurred, The Mary Stewart

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distance as a cable and a half's length, in the hope that the vessels might pass each other. Now, it never can be allowed to a vessel to enter into nice calculations of this kind, which must be attended with some risk, whilst it has the power to adopt, long before the collision, measures which would render it impossible. The *Colonia* postponed till it was too late, measures that would have ensured safety to both vessels, and therefore, whatever may have been the conduct of The *Susan*, The *Colonia* was to blame."

This note is taken from 2 Notes of Cases, p. 13, where it is added to the report of The *Itinerant*.]

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The Mary Stewart. 2 W. Rob.

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was upon the larboard tack, and The Juno was upon the starboard tack. There is, you will observe, some little discrepancy in the respective statements as to the wind; but it does not appear to me that this consideration has any material bearing upon our decision.

We will take the wind to have been about S. W., and we [ \*245 ] may also take it as an admitted \*fact in the case, that both the vessels were close hauled at the time of the collision.

In this state of circumstances, The Mary Stewart (whether rightly or wrongly it will be for you to determine) endeavored to pass to windward of The Juno. In so doing, according to my apprehension of the rule which has been laid down, she was *prima facie* guilty of a violation of that rule, and her owner will in point of law be responsible for the damage in question, unless it can be proved that there were no particular circumstances to justify their deviation from the rule. The burden of proof then lying with The Mary Stewart, it is stated on her behalf that, at the time the two vessels were approaching each other on opposite tacks, The Juno was about to pass to leeward of The Mary Stewart, and that for that purpose her helm was in the first instance kept a-weather; but that her course was subsequently altered, and she endeavored to come up to windward, and the collision was altogether occasioned by such alteration of her original course. The defence of The Mary Stewart, you will observe, is rested upon this statement; and I need scarcely tell you that she is bound to prove and establish this statement by competent evidence.

With respect to the affidavits before the court, I must state that there is not in my opinion sufficient evidence to satisfy my mind that the conduct of The Juno was such as is described. The fact is directly put in issue between the two parties in the suit, and the testimony of the witnesses on the one side and the other is so conflicting, that it would be most extremely difficult for the court, unaided by nautical considerations, to form an opinion which statement is entitled to cre-

dence. I must therefore request your opinion upon the probabilities of the respective statements \*in issue. You are [ \*246 ]

more competent to form an opinion upon these probabilities than I am; and looking at the circumstances of the case, you will have the goodness to inform me whether it is probable that the master of The Juno, under the circumstances, would have attempted to pass to windward, and that he would have put up his helm first a-weather and then to lee in the manner which he has stated. In the absence of proof to the contrary, you must recollect that the presumption is in favor of The Juno, that her master would follow the ordinary course; and with these observations, I will now leave it to

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The Hebe. 2 W. Rob.

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your consideration which of the two vessels in your opinion was to blame.

*Trinity Masters.* We are clearly of opinion that The Mary Stewart was in fault.

Damages pronounced for.

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THE HEBE. Cole.

January 31, 1844.

Pilots going on board a vessel in a leaky condition and assisting the crew, and keeping down the water by pumping, entitled to be rewarded as salvors.  
A tender of 42*l.* overruled, and 65*l.* awarded.

THIS was a cause of salvage, promoted by the owners, master, and crew of a pilot cutter at Yarmouth, for services rendered under the circumstances fully noticed in the judgment of the court.

For the salvors, *Queen's Advocate* and *Dr. Jenner*.

For the owners, *Dr. Bayford* and *Dr. Elphinstone*.

JUDGMENT.

DR LUSHINGTON. The value of the property in this case, including \* the cargo and freight, is admitted to be about 870*l.* [ \* 247 ] It is also further admitted that certain services have been rendered to the vessel, for which a tender of 42*l.* has been made. The sole question therefore which I have to determine is the sufficiency or insufficiency of that tender under the circumstances of the case. It appears that the vessel, prior to her sailing from the port of Sunderland on her voyage to Colchester, on the evening of the 9th of November last, strained herself, and in consequence thereof, according to the affidavit of the master of the vessel, she sprung a leak, making, as it admitted, four or five inches water. It further appears in the progress of the voyage the leakage increased, to what extent is not stated in the affidavit; and when off Yarmouth harbor, about three quarters of a mile distant, the master deemed it advisable to come to an anchor and hoist a signal, the wind at the time blowing a storm from the N. W., and the vessel, as I understand it, lying something



south of the harbor at Yarmouth. At daylight, on the morning of the 9th, the alleged salvors, all of whom, with the exception of one man, are harbor pilots, being on the look-out, proceeded to the vessel and tendered their assistance, which is accepted by the master of The Hebe. A long discussion has been entered into as to whether their assistance was required only for the purpose of piloting the vessel into the harbor at Yarmouth, or whether it was to be considered of a higher and different description. Now I am clearly of opinion that, in the leaky condition in which this vessel was, the alleged salvors were in no degree bound to have taken charge of her, for the purpose of bringing her into the harbor of Yarmouth for a pilotage remuneration. I do not mean that they were not bound to take [ \*248 ] \*charge of her when requested by the master, but that having so taken her in charge under the circumstances of the case, they would be entitled to a larger remuneration than would be paid by vessels which had suffered no damage or inconvenience whatever. Having then been so taken on board, in order to get the vessel into the harbor, it was necessary in the first instance to pay out an anchor and cable. This undoubtedly was no part of the ordinary duty of a pilot. It was a service of a different description. Whilst in the act of paying out the anchor, the wind suddenly shifted from the S. to the N. N. W., which was a favorable wind for the vessel to make for the river Colne, and the master accordingly determined to proceed at once on his original voyage. For this purpose the anchor is slipped, and the alleged salvors having recovered the same, proceeded on board the vessel for the river Colne, where she eventually arrives at one o'clock of the 10th of the same month. The service therefore, in point of duration, lasted from seven o'clock in the morning of the 9th until the afternoon of the 10th, including the whole night of the 9th. It certainly appears that the principal duty which they performed whilst on board was the service of pumping, it being indispensably necessary that one pump should be kept going during the whole of the time. I do not enter into the inquiry what particular quantity of water the vessel was making per hour; it is quite sufficient that she was making so much that she required the labor of these seven persons to keep it under. Now these persons are clearly entitled to remuneration for all that I have stated. They are entitled to remuneration from the first moment they were received on board, for having laid out the anchor and recovering [ \*249 ] the same, and \*also for the services performed whilst they accompanied the vessel to the river Colne. It is also to be taken into the consideration of the case, that although the wind was favorable at this period, and the voyage was accomplished in

safety, yet the vessel was in that condition that if the wind had again come on to blow as it subsequently did a very short time after the service was rendered, the task to be performed by the salvors would unquestionably have been one of infinitely greater difficulty, and might have been attended with considerable danger. Now these, I think, are the leading facts of the case. The salvors have, perhaps, somewhat overstated their case, in averring that the master and crew of *The Hebe* all went to bed. Part of them unquestionably did; but the fair inference is, that some remained upon deck, and were employed in their ordinary avocations, the salvors themselves being occupied in keeping the water under by pumping. It has been said that the tender which has been offered is sufficient, because Mr. Revetts has sworn, that under the circumstances of the case, he could have procured men from Yarmouth to perform the same services at the rate of about 2*l.* 10*s.* per man. Now, assuming the truth of this statement, it is obvious, in the first place, that some time must necessarily have elapsed before these men could have been procured. And in the second place, it is obvious that they would not have been entitled to any reward for having gone on board in the first instance, and of having adopted the preliminary measures for bringing the ship into the port of Yarmouth. It is also to be observed, that men are always to be hired to perform the ordinary work of pumping on board a ship when there is no danger. But it is next to impossible to fix the precise price at which men are to go on a voyage

\* under the possible risk of their lives. I must now advert, [ \* 250 ] in conclusion, to a circumstance which has been much commented upon in the argument, namely, the fact of the boat having accompanied the ship to the river Colne, and the largeness of the expenses which are stated to have been incurred by the salvors in their return to Yarmouth. Now, I must say, that looking at all the circumstances, and more especially looking at the state and condition of the vessel, it was by no means an unimportant or unnecessary precaution that the boat should accompany them for the purpose of carrying them back to their own port of Yarmouth, had the weather been fair; and it is clearly in evidence in the affidavits that they would so have returned, unless prevented by the interposition of tempestuous weather. With respect to the expenses, which are suggested to be exorbitant, it is sworn that they were positively incurred; and looking at the number of persons employed, and considering that after the severe labor in which they had been occupied, they would, upon landing, expect to receive hospitable treatment at whatever public house they resorted to, I do not think the alleged exorbitancy is so great as to be matter of notice from the court. Under all the circum-

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Raft of Timber. 2 W. Rob.

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stances, then, I am of opinion that the tender of 42*l.* is not an adequate tender.

Considering the length of time the service lasted, that these persons were called from their usual avocations, and debarred from the chance of other profitable occupation; that they did perform the service fairly, and conveyed the vessel into a port of safety, I am of opinion that it is necessary to give a larger reward, in order to encourage persons of this description to render similar services when necessary. I shall therefore give them the sum of 65*l.*

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[ \*251 ]

\*RAFT OF TIMBER, Steward.

*Motion.*

February 9, 1844.

Motion for a monition calling upon the owner of a raft of timber, which was found flotsam in Yarmouth harbor, to show cause why salvage should not be awarded for the rescue and preservation of the same.

Motion rejected, upon the ground that the court did not possess a jurisdiction over the subject-matter under the provision of the stat. 3 & 4 Vict. c. 65, s. 6.

IN this case the court was moved to decree a monition against J. Steward, of Great Yarmouth, to show cause why salvage should not be awarded for services rendered in the preservation of a certain raft of timber, the property of the said J. S.

The affidavit to lead the motion set forth, that J. W., master of the steam-tug Accommodation, of Great Yarmouth, was on board his steam-vessel about five, A. M., of the 16th of December, engaged in towing up the harbor a schooner called The Margaret, of Yarmouth, and when he was about half-way up the river he observed something upon the water like a barge, floating down the harbor with a strong ebb tide running. That, being very dark at the time, the deponent and his crew hailed the same to keep the west side of the harbor, to prevent damage, but receiving no answer, the said J. W. gave orders for the steam-tug to be stopped, when he discovered the same to be a large heavy raft of timber, with no person in charge thereof; whereupon the said J. W. being fearful the said raft would drive down upon and sink vessels lying at the piers, or otherwise float out of the harbor and be lost at sea, he immediately towed the said schooner Margaret just

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Raft of Timber. 2 W. Rob.

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above the ballast quay, and not considering it prudent to approach the said raft with the said steam-tug, he, together with two of his crew, took the boat belonging to the said steam-tug, with some ropes, chains and grapnels, and proceeded with all possible speed towards the said raft, which he fell in with and boarded by the malt-houses, and after great difficulty succeeded in \* steering the [ \* 252 ] said raft towards the west shore, when he made the same fast, and left one of his crew in charge ; and as soon as the tide eased, the said J. S. proceeded down with the said steam-tug and swifted the same, and afterwards took it in tow and brought it up to the town, and left it safely moored on the east side of the water. That several applications have been made to S. Steward, the owner of the said raft, for payment of some remuneration for the services so rendered, but that the said J. S. hath refused to make any compensation for the same, and therefore the aid and process of the court is required to enforce payment thereof.

It was further stated in the case, that the master of the steam-tug, after securing the raft, reported the circumstances to Mr. Wheatly, the deputy vice-admiral for the county of Norfolk, and he retained possession of the raft until the 1st of January, when J. S., the owner, removed the same by force, contending that the vice-admiral had no jurisdiction.

Under these circumstances the court was moved to issue the monition as above stated.

In support of the motion, *Haggard* referred to the charter of James the First, and the letters patent appointing Lord Wodehouse vice-admiral of the county of Norfolk, and submitted that under the powers granted by these documents, the Vice-Admiralty Court at Yarmouth, whilst it existed, would clearly have been competent to entertain the claim in question. That the jurisdiction of that court having been abolished by the 5 & 6 Will. 4, c. 76, s. 108, there was now no local tribunal existing at Yarmouth, in which, according to the terms of the patent, the goods picked up can be proceeded against in a cause of \* salvage. That the jurisdiction [ \* 253 ] of the court had been considerably enlarged by the statute 3 & 4 Vict. c. 65, and the terms of the enlargement under the 6th section were sufficiently comprehensive to enable the court to interpose in the matter.

PER CURIAM.

DR. LUSHINGTON. This is an application to the court to decree a monition, calling upon the owner of a certain raft of timber to show cause

why a salvage remuneration should not be awarded to the master and crew of a steam-tug, under the circumstances stated in the affidavit which has been read to the court. The locality where the alleged service was rendered is clearly within the body of the county, and the question arises whether upon the facts disclosed this court possesses a jurisdiction over the subject-matter. Looking to the prior practice of the court, and to the decision pronounced by Sir Christopher Robinson in the case of *The Public Opinion*,<sup>1</sup> I am clearly of opinion that the court, *primâ facie*, would not be entitled to take cognizance of the matter. It has been submitted, however, that since the decision in the case of *The Public Opinion*, the jurisdiction of the court has been considerably extended, and that, under the provisions of the fifth section of the statute of 3 & 4 Vict., the extended power conferred upon the court is sufficiently comprehensive to justify the court in issuing the monition which is prayed for in the present instance. It has also been suggested in support of the application, that the subject-matter of this motion, though locally situated *infra corpus comitatus*, would have been triable in the Vice-Admiralty

Court of Yarmouth under the terms of the vice-admiral's [ \* 254 ] \* patent;<sup>2</sup> and that the alleged salvors, who were manifestly entitled to some remuneration for the service which they

<sup>1</sup> [2 Hagg. Ad. R. 398.]

<sup>2</sup> By the letters patent, dated the 15th June, 1838, the late Lord Wodehouse was appointed vice-admiral of the county of Norfolk and maritime parts thereof, with power to take cognizance of and proceed in all causes civil and maritime, as well between merchants and owners of ships as between any other persons whomsoever, in any matter, cause, or thing, business or injury whatsoever, done or to be done as well upon or by the sea, on public streams, on fresh waters, ports, rivers, or creeks and places overflowed with the ebbing and flowing of the sea and to high-water mark, *as upon all shores or banks to them, or any of their adjacents, from the first bridges towards the sea, together with all and singular the emergencies, incidents, and dependencies annexed and connexed and to hear and determine the same according to the civil and maritime laws and customs of the High Court of Admiralty of England*, and also of and concerning goods, flotsam, jetson, lagon, treasures found, and of all goods whatsoever taken or to be taken as derelict, as well upon the sea *as in all ports public streams, rivers, or creeks, from all first bridges towards the sea, howsoever, wheresoever, or by what means soever arising or happening*, or wheresoever they shall happen to be or be found within the maritime jurisdiction aforesaid, and to preserve the same in any Court of Admiralty of England, then held or to be held before her Majesty or her lieutenant, vice-admiral, or deputy, or four justices to be appointed by commission or letters patent, according to the statute thereupon made and the custom of the High Court of Admiralty of England.

The words printed in italics were the parts of the letters patent more immediately relied upon by the counsel for the alleged salvors.

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The Favorite. 2 W. Rob.

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had performed, would be deprived of the means of enforcing the same unless the court shall interpose in their behalf.

Now the act, 5 & 6 Will. 4, which is entitled the Municipal Corporation Act, provides in the 108th section to the effect "that after the passing of the act the jurisdiction of the Vice-Admiralty Courts (with certain exceptions specially provided in the act) shall be discontinued." I do not, however, find that any \*provi- [ \* 255 ] sion is made for transferring that jurisdiction to the Court of Admiralty. But even supposing that this court had succeeded to all the jurisdiction formerly exercised by the Vice-Admiralty Court at Yarmouth, I am not prepared to hold that I might not be interdicted from interfering in the matter under the peculiar circumstances of the case, unless an express provision is to be found empowering the court to do so under the other statute which has been referred to, namely, the 3 & 4 Vict. c. 65.

How far then is any such authority conveyed by this statute? The sixth section of the act provides in these words (Court here referred to the sixth section, observing) — Now it is quite clear to my mind that by the words of this section the court does not obtain a sufficient enlargement of its powers to enable it to interfere in the present instance. This is neither a ship or sea-going vessel; it is simply a raft of timber. Under these circumstances then I do not think I should be justified in allowing the monition to go out. I must, therefore, reject the motion, and the party on whose behalf the application is made must seek elsewhere in a court of common law the assistance to which he considers himself entitled.

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### THE FAVORITE, Lambert.

February 9, 1844.

A person who, under an agreement with the master of a stranded vessel, had taken charge of the ship, and had succeeded in saving and warehousing a portion of the cargo, the vessel having gone to pieces, held entitled to a salvage remuneration, although his services were to be considered in the character of a meritorious agency rather than of salvage services.

THIS was a suit for salvage, promoted by W. Davey, of Bude, in the county of Cornwall, against a quantity of iron which formed a portion of the cargo on board the brig Favorite, of Sunderland.



It was set forth in the act on petition, that the brig, belonging [ \* 256 ] to the port of Sunderland, sailed for the \*port of Cardiff, with a cargo of refined metal, bound to Rotterdam; that about 11 o'clock, A. M., of the 28th of October, being in a very disabled state in consequence of having encountered a heavy gale whilst standing round the Longships, the master ran the said brig for the land, when, becoming unmanageable, she struck on the beach between two reefs of rocks off the back of the breakwater, near the entrance of the harbor of Bude; that upon the tide receding, the master went on shore and made arrangements with W. D., the asserted salvor, to act in saving the cargo on board the said brig, whereupon the said W. D. took such active measures for the preservation of the same as the occasion required, and was employed therein from the 28th of October until the 10th of November inclusive; that during such time the weather was generally tempestuous, and the said W. D. was almost incessantly occupied day and night in the salvage of the said cargo and removing it to a place of safety; that on the evening of the 3d of November the said brig went to pieces and was washed away, the tide never having entirely left her; and that previously thereto the greater portion of the cargo had been removed and deposited in a place of safety beyond the reach of the tide, the rise of the sea being so great as to wash away to a great distance portions of the iron in the course of its removal, carrying along with it the crab and other machinery used in effecting the said salvage, and thereby occasioning much damage and loss to the said W. D.; that the cargo which had been so rescued was removed to the wharf of the said W. D., about a mile and a half distant from the wreck, and was so removed [ \* 257 ] with great labor and difficulty, the road to \*the said wharf lying over a considerable portion of the breakwater, which is formed of large unhewn stones, and also across a river swollen to a dangerous state by the heavy rain; that the cargo so saved consisted of about 240 tons of refined metal, and required 200 or 300 journeys by carts and horses in its removal; that the agreed value of the said cargo was 610*l.*, and that the payments and expenses made and incurred by the said W. D., including wharfage and breakage of machinery, and the hire of men, &c., and without including any remuneration whatever to the said W. D. for his own services, amounted to the sum of 155*l.*; wherefore the proctor of said W. D., &c., &c.

A reply was brought in on behalf of the sole owner of the iron so salvaged, admitting generally the statement of the salvor as to the extent of the services alleged to have been rendered, but denying that

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The Favorite. 2 W. Rob.

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the services in question were salvage services, but only agency services, and that the expenses incurred by said W. D. did not, as pretended, amount to the sum of 155*l*.

The case was argued by

*Haggard* and *Twiss*, for the salvors.

*Elphinstone*, for the owner of the iron.

PER CURIAM.

DR. LUSHINGTON. This is a suit to obtain a remuneration for services which are alleged to have been performed under somewhat peculiar circumstances. The facts of the case are shortly these.— (Court here recapitulated the facts as set forth in the pleadings, and observed)— Now it is not to be left out of consideration that the cargo which has been thus preserved is of a peculiar character, \*consisting of refined iron, which was not removed [ \*258 ] without very considerable difficulty from the situation in which it was placed when the asserted salvor first offered his assistance. It is also to be taken into the consideration of the case, that the locality of the disaster is upon the coast of Cornwall, in a part of the country where even at the present moment shipwrecked property is liable to other casualties and misfortunes than the mere dangers of the sea ; and where, I regret to say, but little trust or confidence can be reposed in the honesty or the humanity of some of the inhabitants. In the course of the observations addressed to the court by the learned counsel for the owner of the cargo, some objections were thrown out with respect to some of the charges included in the expenses which are alleged to have been incurred by the salvor in the services in question. Complaint has been made in particular to the charge of 30*l*. for watching the property during the time it lay upon the rocks. Now it would be extremely difficult for me to form any opinion as to the precise amount which ought to be charged under the circumstances of the case. Looking, however, to the consideration to which I have just adverted, it is obvious that greater expense would be incurred in securing the preservation of the property upon the coast of Cornwall than in other parts of the kingdom. I do not think, therefore, that I should be justified in disturbing this charge, more especially as it is stated to have been paid, and there is no direct evidence before the court in contradiction of this averment. A similar observation will apply to other of the charges which have been commented upon by the counsel for the owner, namely, the court has no means of forming a judgment whether they are proper or

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The Towan. 2 W. Rob.

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[ \*259 ] not, \*and they have been authenticated as having been actually incurred and defrayed. With respect to the services of Mr. Davey himself, he was employed by previous agreement with the master to superintend and conduct the necessary measures for the preservation of the property, and this agreement he appears to have fulfilled most honestly and fairly from the beginning to the end of the transaction; having through his exertions been successful in saving about 240 tons of iron, which would otherwise in all probability have been entirely lost. He swears, moreover, that his time and attention, and that of his son, clerks, and servants, were very considerably engaged in performing the services in question.

The truth of this averment is not in any degree impeached, under the circumstances of the case; therefore Mr. Davey is most clearly entitled to a liberal remuneration. And although I cannot view his services in the strict character of salvage services, but rather of a successful and meritorious agency, I am of opinion that I shall not exceed the fair *quantum* of reward if I decree him the sum of 250*l.*, to cover all expenses, saving the costs of this suit, which I must allow him in addition.

250*l.* awarded, with costs.

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THE TOWAN,<sup>1</sup> Lewis.

(*Salvage.*)

February 24, 1844.

A claim of salvors, setting up an inflamed and exaggerated statement of alleged salvago services, dismissed, and the salvors condemned in the costs. The crew of a vessel proceeded against coming forward *uno ore* to depose against the interest of the owners, causes a suspicion in the mind of the court.

THE act on petition, in this case, in substance alleged — That, on the 28th October last, the brig Towan, of the burden of 144 tons, whilst in the prosecution of a voyage from Llanelly to Lit-  
[ \* 260 ] tlehampton, with a cargo of \*culm and stone, encountered a heavy gale of wind from the N. W., accompanied by a tremendous sea, which continually swept the decks and stove in

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<sup>1</sup> [S. C. 3 Notes of Cases, 25.]

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The Towan. 2 W. Rob.

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their ship's boat; that about seven, A. M., of the same day, the said brig, then making a foot of water and more per hour, was obliged to run for the port of Padstow, in the county of Cornwall, and succeeded in reaching the entrance of the harbor, when, in order to prevent being driven on shore, her anchor was dropped, and she rode to the same, though in very great peril, the sea every moment breaking over her and sweeping her decks; that, whilst the said brig was so anchored, her windlass overturned and became unmanageable; that R. T., hearing that a brig in distress was running for the harbor of Padstow, immediately manned his boat and proceeded down the harbor, for the purpose of rendering assistance, the wind then blowing a heavy gale from the N. W., with a tremendous sea on; that, whilst rowing down the harbor, they perceived round the Steppar Point, at the entrance of the harbor, the said brig, with a signal of distress flying, and her foretop gallant-mast gone; that the said brig lay in very great peril, the crew being in great distress and shrieking for assistance; that a pilot boat put off from shore towards the said brig, with a line attached to one of the capstan warps on shore, but, in consequence of the gale and heavy sea, the said pilot boat was unable to reach the said brig, and put back for the shore; that thereupon the said R. T. took the line into his boat, for the purpose of carrying off to the said brig, and although the pilot having the charge of the capstan warps warned him that the attempt was too hazardous, the said R. T. directed his crew to pull towards the said brig, then about 150 fathoms from the shore, and after great exertion, and \* great peril of their lives, the said R. T. [ \* 261 ] and his crew succeeded in reaching the said brig, when H. L., the master thereof, and his crew, in a state of much alarm, begged them to take them off the said brig; that the said R. T., having run his boat alongside the brig, threw the end of the line on board, and afterwards the said R. T. boarded the brig, and his crew rowed to the shore, leaving said R. T. on board; that the crew of the said brig were with difficulty prevailed upon by the said R. T. to attend to his directions in endeavoring to save the said brig, but at last he succeeded in cheering up the said master and crew, and, under his directions, they hauled in the line and got the end of the capstan warp to which it was attached on board, and they then drove on the said warp with the capstan ashore; that, finding from the heavy strain of the anchor and warp, owing to the heavy pitching of the brig, that there was great apprehension of their parting, said R. T. signalled his boat to come off again, and sent the line by the said boat to the shore, in order to be attached to another and larger capstan warp, which was done; got on board the brig the crew of

said boat, and made it fast round the foremast of the said brig; and, just as they had so done, the brig's chain and warp at first brought off parted, and had it not been for the large warp so made fast as aforesaid, the said brig and cargo must have become a total wreck; that the said R. T. and the crew of the said brig then hailed the people on shore to heave in the said brig, by means of the second warp, which they did, and thereby got the brig, under a close-reefed maintop sail, from her dangerous situation, into deep water, but that, very shortly afterwards, by the violence of the gale and the eddy of the wind and water, the said brig sheered against the cliff [ \* 262 ] \* and rocks, and was much damaged thereby; that said R.

T., by the aid of his boat's crew, then ran out two anchors to heave the said brig clear, and by means thereof got her a second time into deep water, upon which said R. T. directed the sails to be hoisted, and by such means, and by the assistance of the people on the cliffs, the said brig was eventually got up the harbor, and ran upon the beach to prevent her sinking, she being nearly full of water; that in the service aforesaid the said R. T. and his boat's crew encountered very great risk, and but for their assistance the said brig and cargo must have perished, &c., &c., &c.

On the part of the owners it was expressly denied, in the answer to the act that the weather was so tempestuous and that the brig made so much water, as alleged by the salvors, or that there was any danger of the brig's being driven on shore upon entering the harbor of Padstow, or that there was any necessity for her dropping her anchor, or that, when dropped, she rode to the same in very great or any peril; on the contrary, that the brig, on reaching the entrance of the said harbor, came under the lee of the Steppar Point, and thereby was protected from the wind and sea; and that she was proceeding along the proper channel, with the flood tide, safely and securely, when the master, injudiciously and without any necessity, dropped anchor, bringing up the said brig at the outer edge of the Dunbar sand; that the brig, having been so brought up, rode safely at single anchor about eighty or one hundred fathoms from the shore, and with no breaking sea near her, neither was there any flag of distress hoisted, as witness alleged. The reply having further denied in detail the several averments in the act on petition, and especially

that there was any danger to the crew of The Towan, or [ \* 263 ] risk to the alleged \* salvors in approaching and getting on

board the ship or at any period of the transaction, concluded with the averment, that the tackle so used in assisting the said brig on the said occasion belonged to an association called the Padstow Harbor Association, who have erected capstans and placed buoys at

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the entrance of the harbor, ready for immediate use ; and that such corporation was managed by a committee of twelve, of whom the said R. T. is one ; that such committee, to whom it appertains to make out the charges against vessels so assisted, in so doing invariably apportion and award some recompense and remuneration, varying in amount according to the service performed, for boats and crews carrying out the lines and warps when necessary ; and that when such committee met for the purpose of making out their charges against The Towan, they awarded to the said R. T. and his boat's crew the sum of 12*l.* as a sufficient remuneration for their services, to wit, 6*l.* to the said R. T. for himself and the use of his boat, and 1*l.* apiece for each of his crew.

The cause was argued by

*Addams*, for the owner of The Towan.

*Haggard* and *Twiss*, for the salvors.

#### JUDGMENT.

DR. LUSHINGTON. In questions of this kind, discrepancies and contradictions, to a certain extent, must generally exist in the statements and the evidence on the one side and the other. The court, however, in the majority of cases, finds but little difficulty in ascertaining the amount of the salvage compensation, with a reasonable conviction that no essential error or injustice will be committed by its decision. The present case, I am sorry to observe, furnishes \*an exception, and exhibits contradictions so manifest and palpable, that I can discern no medium, no possibility of reconciling the evidence ; and the only conclusion which I can form, according to my own judgment, is, either that the tender which has been made is utterly inadequate to the service performed, or that the salvors have set up a case, not only inflamed and exaggerated, but entirely inconsistent with the true state of the facts. The substance of the case set up by the salvors is, that the ship and cargo, and also the lives of the crew on board, were in imminent peril ; that a consciousness of this impending peril was manifested by the hoisting a signal of distress, and that the rescue was effected at a moment when other aid had failed, and was attended with equally imminent risk and danger to the salvors themselves. If this statement be true, it cannot, I conceive, be doubted for a single moment that the tender of 24*l.* is utterly and entirely inadequate to the danger encountered, to the rescue of so many lives, and the preservation of the whole of the property on board, although that pro-

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perty may not be of very large value. What, then, is the evidence before the court in support of this statement? There is, in the first place, an affidavit sworn upon the 21st of November, by Lewis, the late master of The Towan, in which he is joined by the whole of his crew; and in this affidavit, with the single exception of the hoisting a signal of distress, they do most fully support the act on petition, describing their own danger as most imminent, and the exertions of the salvors to rescue them as not less perilous. Now it is quite clear that no persons could be more competent, from actual knowledge and experience, to describe the facts correctly; and if this [ \* 265 ] were an unopposed case, as regards the \* nature and extent of the salvor services, and the question was simply referred to the court to fix the measure of the remuneration, I should at once come to the conclusion, upon the contents of this affidavit, that a far higher reward was due to the salvors than has been here tendered. But the nature or extent of the salvors' exertions is directly put in issue and denied, on the part of the owners of The Towan; and is it not, then, a somewhat suprising circumstance to find the master and the whole of the crew thus coming forward to depose against the interest of the owner of the vessel?

It has sometimes happened that one or more of the crew, but very rarely the master, have been found to come forward, and so depose; but I cannot recollect a case in which the master and the whole of the crew have voluntarily united in directly opposing the interests of their employer, as those persons have done upon the present occasion. I must say that this circumstance necessarily awakens some suspicion in my mind, and this suspicion is increased when it turns out, as it does in this case, that, subsequent to the transaction in question, the master has been discharged from his employment, and that the whole crew were for some considerable period of time lodged as it were in the keeping of the salvors. If the matter rested here, and nothing further had occurred, I should have viewed with great suspicion and distrust a statement supported by evidence of such a description; but there is an affidavit made upon the 5th of February at a later period of the cause, which, as far as the master is concerned, most clearly proves that he at least is altogether unworthy of credit, inasmuch that this second affidavit in substance, and to a considerable extent in words, negatives both the salvors' \* act [ \* 266 ] on petition and his own prior affidavit in denying all danger, and stating that no risk whatever was encountered by any one during the transaction. As far then as the master of The Towan is concerned, he is at once put out of court by the effect of this second affidavit. It has, however, been argued, and not unfairly, that the

evidence of the mate and the rest of the crew remained untouched, and that they were in no degree participators in the double and contradictory swearing of the master. Be it so; it must nevertheless be remembered that their statement, which they have come forward in common to support, is in some measure disparaged by the circumstance to which I have previously adverted, and that this disparagement is increased by the falsehood and misconduct of one of the individuals who joined with them in the affidavit. I now come to the affidavits marked No. 2 and No. 3, which comprise the evidence of the salvors themselves in support of their own statement. The affidavit No. 2 is the affidavit of Mr. Tredwin, the master, and in the affidavit he is joined by Lewis and White. This affidavit, as far as regards Mr. Tredwin himself, is entitled *à priori* to the credit usually given to the affidavits of salvors, and it not only supports the act on petition, but in some degree exceeds it. It is, however, to be observed as a somewhat extraordinary feature in this affidavit, that Lewis and White, Mr. Tredwin's fellow deponents, do not depose to several important facts sworn to by Mr. Tredwin himself; as for example, the hoisting the signal of distress, the great apprehensions of danger exhibited by the persons on board, and their prayers to be rescued from that danger. It cannot be said that Lewis and White had sworn to those facts before, because no mention is made of them in the first affidavit, No. 1.

\* The affidavit No. 3 is an affidavit made by Tredwin's [ \* 267 ] boatmen; and the only observation I think it necessary to make upon it at present is, that it exceeds the action on petition, and goes beyond Tredwin's own affidavit, and in fact exceeds every statement in the cause, except one which is to be found in the affidavit of the coast-guard men, marked No. 4. It does not appear whether any person was present who had the command of the coast guard; and, looking to the affidavit, No. 4, I must say that it would have been much more satisfactory to me if I had been supplied with evidence from that quarter. The first part of the affidavit is nearly in the words of Tredwin's affidavit; the latter portion of it is evidently not what men in their condition of life would have spontaneously stated, but is made up of the rhetoric of an attorney's office and irrelevant hearsay.

No. 5 is the affidavit of four laborers, and it describes more minutely the refusal of the pilot to go out, and that an application was made to a person (not named) in charge of the life-boat to launch it, but that he refused, in consequence of the danger. In all other respects it closely resembles the affidavits of the boatmen and the coast-guard men. The sixth and last affidavit to which

I shall refer to the affidavit of Apps, the pilot, and of a person of the name of Mitchell, and, except at the hoisting the signal of distress, it is nearly to the same effect as the affidavit sworn by Mr. Tredwin. I have now gone through the whole of the salvors' evidence, and what is the result? Leaving out of consideration the evidence of the master and crew of The Towan, the result is, that the case which has been set up by the asserted salvors is, I think, still

supported by much evidence which is not altogether unde-  
[ \*268 ] serving of credit. At the same \*time, there is one feature

which pervades the case throughout, namely, that every affidavit on the part of the salvors is couched in terms of great exaggeration, and in a tone wholly unnatural and inconsistent with the character of the deponents themselves. I must now briefly advert, in conclusion, to the case which has been set up by the owners of the vessel proceeded against, and in so doing it will be unnecessary that I should state their case in detail; it will be sufficient to notice the principal points which arise and the evidence relating to them. First, then, was the signal which was hoisted, a signal of distress, or merely a signal for a pilot? This is a question of no small importance in the case, and the solution of it must in a great measure depend upon the degree of danger which impended at the time; for if there did exist danger to life as well as property, it is only consistent with probability that there should have been a signal of distress. Looking to the evidence before the court, it is clear that the master and crew have not deposed that at any time a signal of distress was hoisted, and the evidence of the owners expressly negatives it. It is indeed stated in one of the salvors' affidavits, that the vessel had eight feet water in her hold; but there is no evidence to show that a single pump was at work during the whole transaction. None of the sails were gone; the rigging was in perfect order, and the vessel sailed well. Two of the witnesses, moreover, expressly negative danger of any kind, and state that it was only necessary to warp the vessel for a short distance, to enable her to get into the harbor of Padstow with perfect safety. Under all the circumstances, I am satisfied in my own mind that there was no danger whatever, and

consequently that there was no signal of distress, but only a  
[ \*269 ] signal for a pilot. \*Again, as to the pilot-boat, did she or did

she not attempt to reach the ship? It is pleaded, in the reply to the act on petition on behalf of the owners, that Tredwin himself took the line and pilot-boat, and in the affidavits it is stated that this was done by force. It is not, however, pleaded that it was so done by force, and I think I should not be justified, where the party has had no opportunity of answering the averment, in assuming that vio-

lence was actually used in taking possession of the line. I think that, in justice to Mr. Tredwin, I must not assume the fact as proved in the cause; at the same time I think that the testimony of Harris, and especially of Mitchell, sufficiently contradict the averment that the first boat could not have gone to the assistance of the vessel. There is one remaining circumstance to be noticed, namely, that the Padstow Association considered the sum of 12*l.* a sufficient reward for the service in question, and that this award was made in the presence of Mr. Tredwin. Now undoubtedly Mr. Tredwin was not bound to defer to any such award of the committee; at the same time it is an important ingredient in the case, that the committee, consisting of most competent persons, and sitting *recenti facto* in the presence of the individual most interested, and who had full power and opportunity for explanation, pronounced an opinion that the service would be amply compensated by the payment of the sum of 12*l.*

I do not consider it necessary to travel further into the investigation of this case. I am perfectly satisfied, in my own judgment, of the following facts:—

First, that no signal of distress was hoisted. Secondly, that after the vessel came to an anchor inside the port, there was no peril to the vessel or danger to the lives of the crew. Thirdly, that there was no risk \*in boarding her, and that this \* [270] would have been done by the first pilot-boat, if Mr. Tredwin had not interfered. Fourthly, that subsequent to the transaction, there was an improper resistance to the *supersedeas*, and even a gross attempt on the part of the salvors to retain possession of the vessel; and I will here state that if the possession had been retained after the *supersedeas* had gone down to Padstow, and been served upon the parties, I would most assuredly have attached every individual so engaged in resisting the authority of the court. Lastly, I am of opinion that the arrest of the vessel in the sum of 450*l.* was unreasonable and oppressive, and I think the tender which has been made, under all the circumstances of the case, is ample and sufficient for the services which have been performed.

I therefore pronounce for the tender, and with costs against the salvors, hoping and trusting that this example will prevent the reiteration of similar experiments in future. The whole of the proceedings convince me of the necessity of watching with great vigilance, not to say suspicion, transactions of this description in distant ports, and of protecting owners and underwriters from, what I consider in the present case, an attempt at extortion, supported by the concoction of evidence so strong that its very strength destroys its effect and credibility.

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The James Watt. 2 W. Rob.

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THE JAMES WATT,<sup>1</sup> Cullen.

March 9, 1844.

Where a steamer, coming down the river upon a dark night, meets a sailing vessel beating up the river, and the master of the steamer is in doubt what course the sailing vessel is upon, it is the duty of the master of the steamer to ease her engines and to slacken his speed, until he ascertains the course of the sailing vessel.

A defence — that the master of the steamer, under the circumstances, immediately put her helm to port, in compliance with the Trinity House regulations — not sustained.

THIS was a cause of damage promoted by the owners of the schooner Perseverance, against the James Watt steam-ship.

[ \*271 ] \* An action was brought in the Court of Exchequer by the owners of the steam vessel, and a cross action on behalf of the owners of The Perseverance was also instituted in the same court, and was still pending when the suit was commenced in the Court of Admiralty. Upon an affidavit stating these facts, a motion was made to the court to dismiss the General Steam Navigation Company from further observance of justice in the suit, but this motion was rejected. The proceedings were by plea and proof, and the libel of the plaintiff, which consisted of eight articles, in substance set forth — That the schooner Perseverance, belonging to the port of Exeter, in the prosecution of a voyage from Exeter to London, was brought to anchor abreast the Black Tail Beacon below the Nore at six P. M. of the 30th September. That at half past twelve A. M. of the 1st of October she was got under weigh, and made all sail, working to windward, with moderate winds from the N. W. by N., and about fifty minutes past one A. M. was tacked from the north shore on the starboard tack to the southward. That the morning was bright, and the vessels could be clearly distinguished about half a mile distant, and all hands were on deck keeping a good look-out. That the schooner continued on the tack aforesaid, reaching across with all sails set and close hauled, going at the rate of about two knots an hour until two o'clock A. M., the Nore light being at such time S. W. by W. half W. when a steam-ship (The James Watt) was perceived from the schooner about half a mile distant, and approaching her down the reach at the rate of between eight or ten knots an hour, whereupon all hands on board the schooner loudly and repeatedly hailed those

[ \*272 ] on board the \*steamer to starboard her helm, but that no

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<sup>1</sup> [S. C. 3 Notes of Cases, 36.]

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The James Watt. 2 W. Rob.

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notice whatsoever was taken of such hailings until about half a minute before the collision, when those on board the steam-ship called out to the crew of the schooner to port her helm, but which had already been done to prevent the steam-ship running over the schooner amidships. That immediately afterwards the steamer, in attempting to cross the bows of the schooner, struck her larboard bow a tremendous blow against the starboard bow of the steam-ship, cutting her down nearly to the water's edge and doing other considerable damage. That the said collision was solely and entirely caused by the fault and mismanagement of the crew of the steam-ship, &c. &c.

An allegation, consisting of fourteen articles, was brought in by the owners of the steam-ship in reply, and the substance of the defence which it set up was—That at the time the schooner was first observed, the morning was dark and hazy on the water, so that it was impossible for the persons on board the steamer to see what course the schooner was steering. That there were two lights hoisted on board the steamer, one at the mast head, and the other at the bowsprit end, which lights were plainly visible at the distance of a mile and a half at least, and would have clearly indicated, to any vessel coming in an opposite direction, the course which the steam-ship was steering. That the watch of The James Watt consisted of seven men, who were all on deck, and upon the look-out at the time, and immediately the schooner was discovered, the men on the bows called out ship ahead, upon which the captain immediately ordered them to port the helm, and ease the engines, and both of these orders were immediately obeyed. That finding the schooner was still keeping her course, and \*going over to the southward, the [ \* 273 ] captain then ordered the helm to be put hard a-port, and both engines to be stopped. The crew of the steamer, who were upon deck, at the same time hailing the crew of the schooner to port her helm likewise, whereby the schooner would have gone about, the steam-ship's course having been altered by the portings of her helm aforesaid. That very shortly after the helm of the steamer had been put hard a-port, the schooner, with all her sail set and full, and without at all easing or backing them, so that the force of the collision might have been lessened, came head on into the steam-ship, striking the steamer a violent blow just before the paddle-box on her larboard side, carrying away her bulwarks, and doing her other damage. That the schooner was, from the time of her being first seen until the collision took place, under full command, and would, had her helm been put to port, as it ought to have been, have gone about, whereby she would have got more into the strength of the tide, and the said collision would have been avoided, and that the collision was occa-



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The James Watt. 2 W. Rob.

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sioned by the fault and mismanagement of the crew of the schooner, and was not attributable, as stated, to the default of the steam-ship, &c. &c.

The cause was argued by

*Addams and Robinson*, for the owners of the steam-ship.

*Queen's Advocate and Haggard*, for the schooner.

PER CURIAM.

DR. LUSHINGTON. Gentlemen, two important facts in this case admit of no doubt whatever. It is clear, in the first place, [ \*274 ] that upon the morning when the collision took place, \* The Perseverance, the vessel proceeding in the cause, was beating up the river with an adverse wind; whether from the N. W. by W., as stated on behalf of The Perseverance, or W. N. W., as stated by the steamer, is immaterial. It is also equally clear, that in order so to beat up the river, she was upon the starboard tack close hauled, and was sailing towards the south shore, and as near to the shore as the state of the wind and weather would permit. Whilst pursuing her course as stated, at about quarter past twelve A. M. she discovered the steamer coming down the river at some distance from her. With respect to the actual distance at which the steamer was first observed, there is some discrepancy in the affidavits of the witnesses in the case. I do not, however, consider that any imputation attaches upon them upon this account, because I conceive that it is impossible, under circumstances of this kind, to fix any standard by which the admeasurement of distances at sea can be ascertained with correctness. It is sworn, and there is nothing to contradict this averment, that at this time the crew of The Perseverance were all of them upon the deck, and thus much I take to be perfectly clear, namely, that The Perseverance would have discerned the steamer at a much greater distance than the steamer could have seen the schooner for two reasons, first, because The Perseverance was so much smaller in bulk; and, secondly, because the steamer carried two brilliant lights, which would be more especially discernible by reason of the darkness of the night. The Perseverance then being thus close hauled, and upon the starboard tack, and perceiving the steamer coming down the river, what does she do? It cannot be doubted that she had am- [ \*275 ] ple time to put about, if that was the right measure to \* be adopted; but, not knowing what course the steamer might take, she keeps her course in the first instance. The question arises was she right or wrong in so doing? As far as I am enabled to

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The James Watt. 2 W. Rob.

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form any opinion upon the matter, she was perfectly right. And I conceive that very great inconvenience would arise, if vessels of her description, beating up the river, and being close hauled, should put about the moment a steamer is seen, and before it can be ascertained what course the steamer is likely to take.

Let us pursue the progress of the affair:—As the two vessels are approaching towards each other, the crew of The Perseverance perceive that the helm of the steamer had been put to port, and as soon as they perceive it, they put their own helm immediately a-port likewise. This measure is not inculpated by the persons on board the steamer, because they called upon her to do so, and in my apprehension it was the only measure that could have been adopted, under the circumstances, to diminish the impending evil. It is said, however, that there was ample time for the schooner to have put about between the time when the helm of the steamer was first ported and the collision took place. In order to ascertain this, we must look to the evidence of those on board the steamer, for of course it was impossible for the crew of The Perseverance to perceive that the helm of the schooner had been altered until after it had actually been put to port, and not even then at the very moment. Now the evidence of all the persons on board the steamer distinctly establishes the fact, that two minutes did not intervene between the time when they hailed The Perseverance to port her helm, and the actual collision. Under this state of circumstances I shall refer it to your judgment whether The Perseverance was in \*any degree to blame for [ \*276 ] the conduct she adopted, candidly stating my own opinion that she was not. I must now advert to the case which is set up on behalf of the steamer; and in order to do perfect justice to the owners of that vessel, I will take the account which is given by the master himself of the course which was adopted on board The James Watt. In his deposition in chief upon the second article, he states that “at about quarter past two, or after eight bells had been struck, one of the two men who were on the look-out at the bows (by name Hely and Maybank) called out, a vessel on the larboard bow.” He says, “I was at that moment on the bridge, and turning my attention to my left I perceived an object, without making out what it was—it bore about two points on our larboard bow, and I repeated forward, ‘I see it.’” He then goes on to describe the course the steamer was sailing, and the extreme darkness of the night; and after stating that it was so hazy on the water that he could not distinctly make out what the object was which was seen approaching, nor what course it was standing on, he further states in these words, “Immediately after my answering the men at the bow by saying, I see it, as aforesaid, I

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The James Watt. 2 W. Rob.

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turned aft and called out to the wheel, port, and was answered, port it is." Now let us consider whether, under these circumstances, he ought or ought not to have ported his helm. He was in doubt; that is his own statement. It is also admitted in his answer to the fifth interrogatory, that if it had been daylight, the general rule would have been that the steamer should have gone astern of The Perseverance. Why then did he port his helm? The answer is thus supplied in his own

words in a subsequent part of the same interrogatory. He [ \*277 ] says, "In the daytime The James Watt, seeing \* the course of the schooner, was bound to go astern of her; but being in doubt, by reason of the darkness, I considered it my duty to port my helm and stop my engines." It has been said that in so porting his helm he followed the rule laid down by the Trinity House Board. I must confess that I do not see the application of this rule under the circumstances above stated. True it is, that when two steam vessels are approaching each other, it has been ruled over and over again that they are to pass larboard and larboard; but I have never yet heard it laid down that when a steam vessel is going down the river, and she discovers a sailing vessel coming up the river with an adverse wind, the steamer is immediately to port her helm, before she discovers what course such vessel is upon. In my apprehension, the master of The James Watt would have acted, under the circumstances, with greater prudence and caution if, upon first discovering The Perseverance, instead of porting his helm, he had continued his course at slacked speed, by easing his engines, till he was able to discover the course The Perseverance was steering, and then acting according to circumstances. If he had pursued this course, it is apparent from the evidence of Maybank, that in the short space of about a minute after the sail was reported, or according to Hely a minute and a half from that time, he would have discovered the course of The Perseverance, and could have adopted the measures that might altogether have prevented the collision.

Some discussion has been raised in the argument of this case, whether the collision took place in consequence of the steamer running into The Perseverance, or the latter vessel running foul of the steamer in the first instance.

[ \*278 ] \* In point of law, I apprehend the consideration of this matter would be altogether immaterial to the issue in this cause, because I take it to be the established principle of law, that if a collision is occasioned by the fault of one vessel, it is not of the least importance which vessel strikes the other in the first instance. The true question is, what vessel is to blame in causing the collision? If it were necessary for the purposes of justice in this suit to pursue

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The Gazelle. 2 W. Rob.

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the inquiry upon this point, I must say that the probabilities are strongly in favor of the representation made on behalf of The Perseverance. Here is a schooner of seventy-six tons, going at the rate of about two knots an hour close hauled, and in the act of throwing herself into stays at the moment of the collision, and yet this vessel goes with such force against the steamer as by her own act to cause all the damage that has ensued. Without professing to be very conversant with the details of nautical matters in general, I must say that this representation, upon the face of it, is not very probable, or easily to be credited.

Having now, gentlemen, adverted to all the circumstances of the case which appear to me to be important for your consideration, you will have the kindness to tell which of these vessels is to blame. You will also recollect, that the master distinctly says that in his opinion, in a case of doubt, it was his duty to port his helm, an opinion which, in my judgment, is not conformable with the rules which have been laid down for the navigation of vessels under the circumstances of the present case.

Trinity Masters<sup>1</sup> were of opinion that The Perseverance was in no degree to blame, and that the collision was occasioned entirely by the default and \*mismanagement of The James [ \* 279 ] Watt, in attempting to cross the bows of The Perseverance; that if she had acted properly she would have gone under her stern, and then the accident would have been thereby avoided.

Damage pronounced for.

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THE GAZELLE,<sup>2</sup> Hurst.

March 9, 1844.

Objections to registrar's report. A deduction by the registrar and merchants of one third for the full amount of the repairs and of the cost of new articles, in consideration of new articles being substituted for old, not sustained by the court.

In fixing the amount of demurrage to be paid for the detention of the vessel during the repairs, a deduction must be made from the gross freight of so much as would in ordinary cases be disbursed on account of the ship's expenses in the earning of the freight.

Report sent back to be reconsidered.

In this case, which was originally a cause of damage by collision,

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<sup>1</sup> [Captain Locke and Captain Back.]

<sup>2</sup> *Vide supra*, vol. i. p. 471; [s. c. 3 Notes of Cases, 75.]

promoted by the owners of the brig Charles, the court, assisted by Trinity Masters, pronounced for the damage, and condemned The Gazelle in the amount of the same and of the costs. A reference in the usual form was directed to the registrar and merchants, and a report having been brought in, certain items in the report were now objected to on behalf of the owners of The Charles. The principal and most important of the objections are noticed in detail in the observations of the court.

In support of the registrar's report, *Addams* and *Harding*.

In support of the objections, *Haggard* and *Jenner*.

PER CURIAM.

DR. LUSHINGTON. In this case, which was originally a case of collision, the court pronounced for the damage sued for, and directed the amount to be ascertained in the usual form, namely, by a reference to the registrar and merchants. The registrar having made his report in obedience to the court's directions, various items [ \* 280 ] in this report have been objected to on behalf of the \* owners of the vessel proceeding in the cause, and the court is now called upon to determine the validity of the objections which have been thus raised. One of the principal and most important objections to the report under consideration is this, that the registrar and merchants, in fixing the amount to be paid for repairs and the supply of new articles in lieu of those which have been damaged or destroyed, have deducted one third from the full amount which such repairs and new articles would cost. This deduction, it is said, has been made in consideration of new materials being substituted for old, and is justified upon the principle of a rule which is alleged to be invariably adopted in cases of insurance. The first question then which I have to consider is the applicability of the rule in question to a case of the present description; and this question, it is obvious, involves a principle of considerable importance, not only as regards the decision in this particular case, but as establishing a rule for assessing the damages in all other similar cases. Now in my apprehension, a material distinction exists between cases of insurance and cases of damage by collision, and for the following reasons: With respect to all policies of insurance, I apprehend that the cases are cases of contract. In the construction and regulation of such contracts, all the customs of merchants founded in equity are always considered as forming a part of the contracts themselves; and the presumption is that all merchants are cognizant of the customs existing in their own particular

vocations, and have them in contemplation in all contracts which they may enter into in their several transactions of business.

In the immediate case, for instance, of a policy of insurance upon a ship, the ship-owner who insures his \* vessel is [ \* 281 ] aware of the custom in question, and at the time the insurance is effected he knows that he pays a smaller premium for the insurance, in consideration of the deduction to be made in case of loss or damage to his ship. If such loss or damage ensue thereupon, he cannot claim to receive more than the custom sanctions and allows; and in recovering the amount of his loss, minus the deduction of the one third, he in point of fact receives all that he agreed to receive in pursuance of the contract which he entered into with the underwriter.

With regard to cases of collision, it is to be observed that they stand upon a totally different footing. The claim of the suffering party who has sustained the damage arises not *ex contractu* but *ex delicto* of the party by whom the damage has been done; and the measure of the indemnification is not limited by the terms of any contract, but is coextensive with the amount of the damage. The right against the wrong-doer is for a *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur,) the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.

Having thus far endeavored to elucidate the principle which governs the two classes of cases, I will now shortly advert to the authority of the case which was \* cited in the argument [ \* 282 ] by the learned counsel for the owners of *The Charles*, and if I find that in the courts of common law the principle has been applied to any case *ex delicto* in the manner to which I have referred, it will be my duty to adopt and apply the same principle in this and future cases of the like kind, more especially as I do not find that in the practice of this court there has been any such consistent and uniform course of practice as would militate against its introduction. Since the case was argued, I have caused inquiry to be made into the case of *Hare v. Beckington*, and I find that the learned counsel was perfectly correct in his representation of what fell from the learned judge who decided that case. The words of Mr. Justice



Cresswell were to this effect: "When a man runs down a vessel, he cannot claim an abatement of one third for old materials; it is different in insurance cases, because there it is an understood part of the contract." I do not find that any attempt has been made to impeach the law as thus laid down by Mr. Justice Cresswell. I shall, therefore, adopt the principle in the present instance, and refer back the report to the registrar and merchants to be amended with respect to the several items or sets of claims in which the deduction of one third has been made for the new materials supplied.

I now come to another important item in the report which has been made the subject of objection in the present instance. It appears that the owners of *The Charles*, in estimating the amount of their indemnification, have claimed the sum of 94*l.* 10*s.* for demurrage in the detention of the brig during the repairs. This claim has been disallowed in the report, and the question arises, what is the principle upon which compensation is to be allowed for the detention of a vessel under the circumstance of the case.

[ \*283 ] \* Now I apprehend that the party who has suffered the injury is clearly entitled to an adequate compensation for any loss he may sustain for the detention of his vessel during the period which is necessary for the completion of the repairs and the furnishing new articles.

It has been argued, by the counsel for the plaintiff in this suit, that, in framing the amount of this compensation, the same principle must be adopted as prevails in cases of insurance; and the court has been referred to the case of *Palmer v. Blackburn*,<sup>1</sup> in which the gross freight was allowed, without any deduction on account of necessary expenses. The result of the decision in that case was, that by the allowance of gross freight the party was actually benefited by the loss of the vessel, because he took the whole of the freight, amounting to 3,068*l.*, without any deduction whatever, although, if the voyage had been successfully performed, the actual deduction to be made for expenses would have amounted to 700*l.* Now upon what ground was the decision in the case of *Palmer v. Blackburn* founded? The case was tried before Lord Chief Justice Dallas, Mr. Justice Park, and Mr. Justice Burrough. Lord Chief Justice Dallas doubted the propriety of the determination, and wished to have had the opportunity of further consideration upon it; and, in concluding his judgment, he says, — "I think the point of considerable importance, and worthy of further consideration."

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<sup>1</sup> [1 Bing. 61; s. c. 7 Moore.]

Mr. Justice Park and Mr. Justice Burrough were of opinion that the rule adopted in policies of insurance was applicable to the case. The words of Mr. Justice Park were, — “The jury have found that upon policies freight has always been settled in this manner, and my experience entirely coincides with that finding.” Mr. Justice \* Burrough said, — “In questions on policies of insur- [ \* 284 ]  
ance, the course has always been to ascertain the custom of merchants. The jury having found, and properly found, this to be the custom of merchants, the verdict must be in conformity with such finding.”

From these observations of the learned judges it appears, that the ground upon which this decision was founded was the custom of merchants, which, as I have already observed, is always considered in policies of insurance as forming a part of the contract itself. In the present case the claim arises, not *ex contractu* but *ex delicto*; the principle, therefore, which governed the case of *Palmer v. Blackburn* does not apply. In estimating the amount of the compensation to be paid for the detention of the vessel, I conceive that the same principle must be adopted as I have applied in the case of the deduction of the one third, namely, the principle of putting the suffering party as nearly as possible in the same situation in which he would have been if no collision had taken place. Deducting, therefore, from the gross freight so much as would, in ordinary cases, be disbursed on account of expenses in the earning of the freight, I shall refer back this item to the registrar and merchants for their further consideration and correction. With respect to the remaining items which have been brought under the notice of the court, they are comparatively far less important, and the court is not in possession of sufficient evidence to form any judgment respecting them. The item No. 6 is a claim for the sum of 6*l.* 14*s.* for stationery, postage, grocery, bread, flour, and tarpaulins. This item has been disallowed by the registrar and merchants, as I understand, upon the ground that there was not sufficient proof of the loss, and that some of the articles were bought after the time when the repairs were completed. \*If this be so, the registrar and merchants [ \* 285 ] have properly rejected the claim upon this ground. The affidavit in support of the claim is not sufficiently specific to justify the court in disturbing this part of the report. If the affidavit had been more specific the court might have been inclined to reconsider the objection; but as the *onus* is upon the party objecting to show that his exceptions are well founded, if he fails to furnish sufficient grounds to establish his objection, I must, of necessity, sustain this item in the report as it stands. The item No. 10 is open to the

same observation ; it includes a claim for 7*l.*, for three cwt. of beef, and in the affidavit it is simply sworn to in the same manner, and without stating how, when, and where the money was expended. It is impossible for the court to take notice of a claim so barely supported, because it is nothing simply to aver that the expense has been incurred. The question is, whether it was properly incurred, and whether the party against whom it is charged is liable for the payment. Another item is to the following effect : — Owner's expenses to London, Norwich, &c., 15*l.* From this sum the registrar and merchants have deducted the sum of 5*l.*

In the absence of any voucher for the actual expenditure of the sum so charged, and of any explicit statement that it was proper and necessary to be incurred, I certainly am not disposed to interfere with the deduction which has been made by the registrar and merchants. The registrar and merchants, I conceive, have founded their deduction upon the consideration of what appeared to them a just and proper sum to be allowed for the execution of those measures which were imposed upon the owner, in order to obtain [ \* 286 ] a proper settlement of his case ; and I must say that, \* as far as I am enabled to form any opinion upon the question, the sum of 10*l.* does appear to me to be a liberal and sufficient allowance.

With respect to the remaining items in the registrar's report, which have been commented upon in the argument at the bar, I do not think it necessary to advert to them more specifically in detail upon the present occasion. The objection which has been raised against them is not very important ; and as it is my intention to refer the report back, to be generally reviewed by the registrar and merchants, they will have the opportunity of reconsidering them, and of regulating them according to the doctrines which I have endeavored to lay down, if it should happen that an erroneous principle has been applied.

THE MATHESIS,<sup>1</sup> Alexander Gordon.

(Motion.)

April 26, 1844.

Where an attachment from the Court of Admiralty, backed by the Lord Ordinary's concurrence, had been executed upon a person resident in Scotland, and the person so attached had been brought to England and committed to the Queen's Bench prison, the court directed a *supersedeas*, and the party to be released, upon the ground that the Lord Ordinary of Scotland had subsequently revoked his concurrence as illegal, and as granted *periculo petentis et per incuriam*.

In this case the vessel, The Mathesis, was originally arrested in a cause of interest, at the suit of a part-owner of thirty sixty-fourth parts, until bail should be given to answer the safe return of the ship to the port of Aberdeen, to which she belonged. Whilst under the custody of the court, she was forcibly taken out of the possession of the court's officer and carried to sea, at the instigation of A. Gordon, (also a part-owner of the remaining thirty-four sixty-fourth shares,) against whom a warrant of attachment was decreed for contempt of court in so doing. The said J. G., it appeared, was resident in Scotland at the time the attachment was issued, and the warrant of the Court of Admiralty having been backed by the concurrence of the Lord Ordinary of Scotland, J. G. was arrested \* at [ \* 287 ] Peterhead, in Scotland, and brought back to England, when a second attachment was served upon him, and he was committed to the Queen's Bench prison. Subsequent to the arrest of said J. G. proceedings were instituted, on his behalf, before the Court of Session in Scotland; and the Lord Ordinary having heard counsel on his behalf, and also on behalf of the party at whose suit the attachment in this court had been taken out and executed, revoked his original concurrence to the service of the attachment, and directed the immediate liberation of the prisoner.

Under these circumstances, the court was now moved to supersede its warrant of attachment, and direct the liberation of J. G., in conformity with the sentence pronounced in the Lord Ordinary of Scotland's decree.

The motion was supported by *Addams*, on behalf of W. S. Gordon.

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<sup>1</sup> [S. C. 3 Notes of Cases, 133.]

And opposed by *Phillimore, A. A.*

JUDGMENT.

DR. LUSHINGTON. If the circumstances of the case had allowed me the opportunity, I should have deferred to deliver my judgment for the purpose of considering the arguments which have been addressed to the court upon the present occasion. When, however, I recollect that the liberty of a British subject is involved in the question in issue, I deem it my duty to declare my opinion at once, without taking time for further deliberation. It appears that the vessel, *The Mathesis*, whilst lying in the port of Swansea, was arrested under the process of this court, in a cause of giving bail before she proceeded to sea. At the time of the arrest, [ \*288 ] therefore, she was clearly within the jurisdiction \* of the High Court of Admiralty, and no question was raised as to the issuing of the warrant, or the detention of the vessel in the custody of the court. It further appears that, whilst so in custody of the court, Mr. James Gordon, the party on whose behalf the present application has been made, took possession of the vessel, and removed her from the keeping of the officer of the court, and, in so doing, he was manifestly guilty of a great and grievous offence, and one which rendered him amenable to the attachment of the court. What might be the effect of such conduct, unless the court possessed the authority of so attaching the party committing such an offence? In a case of bottomry, for example, where the vessel and her appurtenances form the primary security of the bottomry bondholder, and the arrest of the vessel is, in this court, the only mode of enforcing the payment of the bond, if the conduct pursued by Mr. Gordon could be pursued with impunity, the jurisdiction of the court might be set at defiance, and the attainment of justice be entirely defeated. The same observation would apply with respect to cases of possession, and also to cases of salvage. I am, therefore, clearly of opinion that the conduct of Mr. Gordon was such as imperatively demanded the prompt interference of the court; and when that conduct was duly brought under the court's notice and verified by affidavit, the court felt no hesitation in immediately directing the attachment to issue, in the exercise of its ordinary jurisdiction. It is unnecessary for me here to attempt to define what are the limits of the jurisdiction of this court, in questions of this description. The reported decisions of the court show that attachments have been sent to be executed in various quarters of the globe, and I apprehend [ \*289 ] that \* there is no limitation whatever as to the place in which they may be served, provided they be served with

the concurrence, and according to the law of the country in which it is attempted to put them in force. If a warrant of attachment issued from this court was served in France, with the concurrence of the authorities of that country, and the party against whom the warrant was issued was legally brought within the jurisdiction of this court, I should have no hesitation in signing his commitment. In the present case the court does not claim, and could not claim, any admiralty jurisdiction within the kingdom of Scotland. By a recent statute, 1st of W. IV., c. 69, the jurisdiction of the Court of Admiralty in Scotland has been transferred to the Court of Session in that kingdom; but in no respect has it been transferred to the High Court of Admiralty of England. It is, therefore, abundantly clear that the attachment in question in this case could not have been legally served in Scotland, save with the concurrence and through the authority of those who are legally authorized to exercise that authority in Scotland. The first question, then, which I must consider in the present instance is, what concurrence has been given,— what concurrence has been withdrawn,— by the Court of Session in Scotland; and, if an appeal from that court is pending, how far that circumstance ought to influence my present judgment.

Now the proceedings of the courts in Scotland in reference to this matter, as they are disclosed in the authentic papers before the court, appear to have been these: Mr. Gordon being resident in Scotland, the attachment issued by the direction of this court was laid before the Lord Ordinary, Robertson, and he gave his immediate concurrence to the execution of \* that attachment, thereby [ \* 290 ] adding the sanction of the court in Scotland to the authority of the Court of Admiralty in England, which, without such sanction, would, as I have already stated, in Scotland have been of no effect. By virtue of this concurrence Mr. Gordon was without loss of time arrested at Peterhead and conveyed to this country; and subsequent to his arrest, a note of suspension, as it is termed, was addressed on his behalf to the Lords of Council and Session, complaining of the illegality of the arrest, and praying an interdict and order of his liberation. Upon the 3d of June the question was argued before the Lord Ordinary, and it appears that the Lord Ordinary, upon consideration of the facts of the case as stated, made his decree in these words:—“ The Lord Ordinary, having heard counsel for the suspender, and also counsel for the respondent, Alexander Morice, for whom appearance was made, and having also considered the note of suspension and liberation, together with a copy of the application by the respondent, stated to have been made to the Lord Ordinary on the bills on the 27th day of May last, and on which a



concurrence was, as a matter of form, subscribed by the Lord Ordinary on the 28th day of May, without the matter having in any way been brought under the consideration of the Lord Ordinary or his attention called to the same, in respect that there is no ground or law set forth in the said copy of the petition which would have induced the Lord Ordinary to have granted the same concurrence if he had been aware of the grounds on which the said application was made, and that the same was granted *periculo petentis et per incuriam*; and also in respect of the nature of the English warrant sought to be carried into execution, and of the nature of the execution

[ \* 291 ] \* demanded thereon, passes the note without caution or consignation, grants warrant for the immediate liberation of the complainant as craved, and continues the interdict."

It does not appear upon the face of the documents before the court, what was the nature of the representation which was made to the Lord Ordinary on behalf of Mr. Morice, the party who had originally sued out the attachment. Whatever it might have been, the effect of of the decree, it is obvious, was an order for the immediate liberation of Mr. Gordon.

Under this state of circumstances I have now to determine the course which it is the duty of this court to adopt, and in forming my opinion I must bear it in mind that the Lord Ordinary expressly states in his decree that he was altogether unaware of the nature of the writ issued by this court at the time he gave his concurrence to its execution in Scotland, and that if he had been apprised of its contents and the nature of the case, he should not have considered himself justified in law in proceeding as he did; this he states upon deliberation, and after having heard the case argued upon both sides. Now when a warrant issued by the High Court of Admiralty is executed in a foreign country by the comity of the law of that country, I conceive it to be my duty, as judge of the court from which the warrant issued, to consider whether the consent of the foreign authorities is conceded upon deliberation, or whether, as stated by the Lord Ordinary in this case, that concurrence is obtained *periculo petentis et per incuriam*. I also further from this case apprehend that I should not be at liberty to avail myself of that concurrence where the sanction is given unadvisedly or *per incuriam*. If, therefore, the case

[ \* 292 ] rested here, I should be of opinion \* that as the Lord Ordinary of Scotland, in which country the warrant has been executed, states that in his judgment the attachment ought not to have been enforced in that country, I should be bound to pay respect and deference to that judgment upon the present occasion, and this upon the principle of justice as well as of public polity; for how

could this or any other court in this country expect the aid and assistance of foreign jurisdictions unless it paid deference to their forms of proceedings, and never attempted to give force to and execute its warrants, in derogation of and contrary to the legal customs and usages of the country in which it is sought to enforce them.

It has been urged upon the court by the counsel for Mr. Morice, that the retraction of the Lord Ordinary's concession cannot be considered as conclusive in the present instance, inasmuch that an appeal has been lodged against the Lord Ordinary's decree, and is at this moment pending before the Inner Court, before whom the whole question will be re-argued. This fact undoubtedly adds another difficulty in the case, and the question arises, ought I for the reason suggested to detain this individual in custody under this attachment? I think not, and for this reason, that this court has no means of ascertaining how long it may be before the question can be re-argued and finally discussed and determined before the judges of the Inner Court; and sure I am that, unless I was perfectly satisfied that the decision would be given in a very short space of time, I should be most reluctant to deprive a British subject of his liberty during the interval that must intervene.

Another suggestion has been urged on behalf of Mr. Morice, which remains to be considered in conclusion. It has been said that, however wrongfully \*Mr. Gordon may have been [ \*293 ] arrested under the original attachment which was served upon him in Scotland, yet that a second attachment has been executed upon him since his arrival in this country, and that in virtue of that attachment he is now legally in custody and duly within the control of this court. I must confess that I cannot accede to the force or propriety of this suggestion. If Mr. Gordon has been wrongly brought by the process of the court from a country where he was legally secure from the enforcement of that process, (it is true with the concurrence of a judge of that country, but a concurrence since recalled,) it would, I conceive, be contrary to all principles of justice to enforce a fresh attachment upon him upon the plea of his being thus compulsorily located within the jurisdiction of the court at the time when the second attachment was executed upon him. If I were to decree his release from the former attachment, because there was not sufficient authority to back the warrant in Scotland, and allow him to be arrested and detained upon the second attachment, it would be an illusory proceeding and a mockery of justice. My opinion therefore is, that I must order the immediate release of Mr. Gordon, and although I may regret that justice is thereby likely to be defeated in the present instance, yet I am the more disposed to adopt this course,

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The Graces. 2 W. Rob.

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upon the consideration that if this court should err in liberating the prisoner, and the Inner Court in Scotland should reverse the interlocutory decree of the Lord Ordinary, it will be competent to the court immediately to re-execute the attachment, and he will be brought to this country and recommitted with safety to all parties. It is in my opinion much better that some additional inconvenience and expense should be incurred, than that Mr. Gordon should be detained [ \* 294 ] \* until the appeal has been heard, and it should turn out that the interlocutory decree of the Lord Ordinary is affirmed, and that he has consequently been unjustly and illegally detained. Upon this consideration, therefore, I shall direct the prisoner to be liberated.

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THE GRACES.

May 23, 1844.

Defence in a suit for salvage, that the salvors undertook to perform the alleged service for a stipulated reward, overruled as contrary to the probabilities of the case ;<sup>1</sup> *semble*, where steamers go out of port for the express purpose of rendering assistance to vessels represented to be in distress, the time and expense incurred in reaching the vessel is to be taken into the calculation in fixing the amount of salvage remuneration.

THIS was a cause of salvage under the circumstances fully noticed in the judgment of the court.

*Addams and Bayford*, for the salvors.

*Queen's Advocate* and *Nicholl*, for the owners.

JUDGMENT.

DR. LUSHINGTON. There are two points in this case to which the attention of the court must be especially directed; the first is, whether any valid and binding agreement was entered into between these parties; and secondly, assuming that no such agreement existed, whether the tender of 3*l.*, which has been offered, is an adequate remuneration for the services which have been rendered. In order to ascertain these points, it is necessary that I should briefly examine some of the facts of the case which have been discussed upon the present occasion.

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<sup>1</sup> [See *The True Blue*, 2 W. Rob. 176.]

The vessel, it appears, is of 197 tons burden, and was bound in ballast from London to the port of Seaham. Upon the 5th of December, having reached the coast of Yorkshire, she met with an accident, whereby she lost part of her foremast. Having remedied this accident as far as it was in her power, she made an \* attempt, not to reach Seaham, her port of destination, but [ \* 295 ] Shields, where her owners resided, and where she intended to refit, and finding it impossible to reach Shields upon the tack she was then sailing, she wore round and sailed for the south until she reached Huntcliffe Foot, where she cast anchor, and according to her own account in such a position that a signal for assistance might be seen from the shore.

Whilst lying in this position she was observed by a pilot of the name of Fox, and he, as he states, apprehending that she was in a state of distress, and perceiving a signal for assistance hoisted, determined to proceed across the country to Middlesborough, a distance of eight miles, for the purpose of giving information to the steamers there, in order that they might go out and perform the service, whatever it was which the signal was intended to indicate. It appears that the signal was hoisted as early as eight o'clock in the morning, and that no steamer came out until three o'clock in the afternoon. The distance is represented as being, and there is no controversy upon the point, eighteen miles. If this vessel then was lying as described by herself, in such a position that any signal hoisted by her would be descried by the steam vessels in the river Tees, I am unable to discover any satisfactory reason why some vessel did not observe that signal, if wind and weather were ordinarily moderate and fair, and proceed to render the assistance at a much earlier period than any attempt to do so was made in the present instance. Whatever may be the reason, it is perfectly clear that no vessel did proceed to render assistance until The Pilot, a steamer of sixty-horse power, in consequence of the intimation received from Fox, and not of perceiving \* any signal, leaves the port of Middlesborough [ \* 296 ] and proceeds to The Graces, lying at Huntcliffe Foot. Now what is the state and condition of the vessel at this time? It is admitted that she had lost a part of her foremast, and it is represented on the part of the salvors that she was in consequence thereof in a disabled state. On the part of the owners, on the other hand, it is alleged, that although damaged by the accident she had met with, she was in no degree disabled, and that she was capable of navigating to any port for which the wind was favorable, and to which she might have got with facility. In my view of the case I apprehend that the condition of the vessel is not properly to be described as disabled, or as in a state of immediate danger in consequence of the accident

in question. At the same time I conceive that, supposing the ordinary contingencies occurred of a change of wind and weather, contingencies not unlikely to occur at the season of the year when this transaction took place, the vessel would, in case of foul weather, have been exposed to greater risk and danger than if the accident had never happened, and, therefore, she is not to be considered in the light of a vessel which had met with no misfortune. I now come to the conversation which is represented to have been held upon The Pilot, steamboat, arriving alongside the schooner, and I must examine the effect of this conversation, which has been contended to constitute an agreement between the parties.

Now I entirely accede to the position laid down by one of the learned counsel who have addressed the court, namely, that if a conversation takes place between two parties, and in pursuance of that conversation an act is done which is in fact the commencement of a transaction, where the evidence establishes the point, the [ \* 297 ] \* court must assume the existence of an agreement, and the party is not at liberty to recede from the effects of such agreement. For example, assuming in the present instance that it had been stated by the master of this vessel, as represented by himself, that he would give 3*l.* to the crew of the steamer to take him to Hartlepool, and the master of the steamer had said, "give me a rope," and had immediately proceeded to perform the service, I think under these circumstances a binding contract must be held to have been entered into. As regards the present case I need scarcely observe, that the proof of the alleged agreement which has been set up rests with the party who has set it up; and that this proof must be clear and satisfactory, in order to induce the court to depart from the ordinary principles of adjudication, and introduce the agreement instead. How then do these proofs confirm the agreement in question? The direct evidence of the agreement consists in the testimony of no less than seven of the crew of The Graces, who speak *uno ore* to a very detailed communication, which it is not necessary for me to repeat. I should be extremely reluctant to attribute to parties so deposing an entire invention of facts which have no foundation whatever; at the same time I must confess that my conviction of what is stated to have occurred is not strengthened very much by the fact of seven people swearing in detail to a conversation of this description. I must say that when I see all the persons on board a vessel, whether they had an opportunity of hearing it or not, having memories so exceedingly accurate as to depose in the same terms to a conversation of this extent, I am inclined to think that the very accuracy of their memories should induce me to entertain some doubt upon the question.

\* But even giving to the master of The Graces the credit [ \* 298 ] of speaking the truth, namely, that the conversation to which I have alluded actually did take place, in order to make the alleged agreement a valid contract, binding upon the asserted salvors, something more must be done; it must be proved that the master of the steamer actually heard that conversation; he might have heard a part of the conversation and not the whole. Looking to the evidence in the cause, I find in the act on petition a direct contradiction that any such contract was entered into; and in the affidavits I find a general denial of agreement. It is to be observed, however, that these do not in express terms avouch that no such conversation took place; they contain only a general disavowal instead of a specific denial of the facts. This circumstance, I must confess, did *prima facie* create some suspicion in my mind. I do not, however, think that I should be justified to go the length of saying that when the master of the steamer swears that no such agreement took place, he meant to swear merely to the effect of the conversation, admitting the conversation actually to have taken place, and not denying it. It is unquestionably a most inconvenient mode of framing an affidavit, but it would fix upon him, in my opinion, the imputation of perjury of the worst description if I imputed to him that the whole of the alleged conversation took place, and that he intended in his affidavit to negative it in effect although not in words.

Under this state of circumstances I must in some degree be governed by the probabilities of the case; and looking to the facts which are before me, I must say that in my judgment it is highly improbable that the master of this steamer of sixty-horse power, having come a distance of eight miles for the \* pur- [ \* 299 ] pose of rendering assistance to a vessel represented to be in distress, would have accepted of a proposal to convey that vessel, at this season of the year, (under every contingency of wind and weather,) a distance of ten or eleven miles for the sum of 3*l*. I am the more confirmed in my opinion that there was no such binding agreement between the parties when I look a little further into the *res gestæ* of the case, and consider the conduct of the master of The Graces as disclosed in the proceedings before the court. I find it stated in the course of the act on petition, as a cause of complaint against the alleged salvors, that the master of the steamer, having entered into the alleged agreement to tow The Graces for 3*l*. to Hartlepool, instead of fulfilling his engagement towed her into the Tees, and there anchored; and this, it is said, was done against the remonstrance of the master of The Graces. If this had occurred, and there had been any such agreement, what would have been the natural



conduct of the master of The Graces? Would he not have remonstrated at once, and declined the payment of the 3*l.* as forfeited by the non-fulfilment of the contract? But what follows? Why, so far from discovering that any such remonstrance was made, I find in the pleadings before me that a new and specific arrangement was endeavored to be made between the parties to carry the vessel to Shields, and that the arrangement was broken off in consequence of some disagreement existing between them as to the terms of the remuneration. Is this circumstance consistent with the statement that is set out by the owners of this vessel as a defence to the salvors' claim in the present instance? I conceive not, and I, therefore, feel

myself bound to assume that no such agreement was entered [ \* 300 ] into. In so concluding, I do not \*attribute to any of the parties in the suit any thing in the nature of perjury. The discrepancy in the respective statements may, I think, be otherwise sufficiently accounted for upon the supposition that from the noise of the sea and the distance at which the two vessels were from each other, the conversation was not heard by the persons on board the steamer. The question, then, which remains to be determined is a very simple one, and will require but very little consideration, namely, is the sum of 3*l.*, which has been tendered, a sufficient remuneration under the circumstances of the case? I am clearly of opinion that it is not. It has been argued that I am not to take into consideration that the steamer came in the first instance from Middlesborough, but must confine the service to the towage from Huntcliffe Foot to the river Tees. I am not disposed to admit of any such restriction upon the claim of the asserted salvors.

Where a steamer is plying in the Thames or elsewhere for an engagement, undoubtedly she can have no pretence for charging upon a vessel which she takes under her care the expenses incurred during the time she was so plying; but where a vessel comes out in consequence of a signal to render assistance to a ship represented to be in distress, it appears to me to be contrary to all the principles that have heretofore governed the proceedings in these cases that the time and expense in going out to the vessel so situated should be left out of the calculation. It is, I apprehend, a universal maxim, that where parties do so go out to render assistance to vessels in greater or less distress, that this circumstance is always considered as forming an ingredient in the amount of the remuneration that they are to receive.

[ \* 301 ] Upon the whole view of the case I am of opinion \*that the tender that has been made is clearly insufficient. The service in question was performed, the weather continuing as it was,

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The Lord Auckland. 2 W. Rob.

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with no risk and with great facility, it is, therefore, a service to be paid at no very high rate. I have no hesitation, however, in saying that I must consider it as a towage for thirty miles, and not for eleven as suggested; and I shall award the sum of 15*l.*, and of course with the costs. I cannot, however, conclude my observations without saying one word upon the sum at which the action was entered. The action has been entered in the sum of 350*l.* This amount, under the circumstances of the case, does appear to me somewhat vexatious; and I take this opportunity of expressing the hope that in future questions of this description more care will be taken to apportion the demand to something like that which justice may require.

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THE LORD AUCKLAND.<sup>1</sup>

May 23, 1844.

A monition extracted by a bondholder calls upon I. D. P., the secretary of the East and West India Dock Company, to bring in certain deposits lodged in his hands by the consignees of the cargo on account of freight.

I. D. P. having prayed to be heard on his petition as to the construction of the statute 3 & 4 Will. IV. c. 57, s. 47, upon the petition being subsequently abandoned, and the freight brought in, I. D. P. dismissed, but without costs, the question being *primæ impressionis*.

In this case an action was originally entered against the ship and her freight in a cause of bottomry. The bond was not opposed, and the court, by judgment in default, pronounced for its validity, and decreed monitions against I. D. P. the secretary of the East and West India Dock Company, and Sir J. H., secretary of the Saint Katherine Dock Company, to bring in the amount of freight which had been received by or on behalf of the said dock companies upon such parts of the cargo of the said ship as had been released and delivered to the consignees thereof.

An appearance was given to the monition on behalf of the secretary to the East and West India Dock Company, who prayed to be heard on his petition; \*and an act was brought in, [ \*302 ] setting it forth to the following effect:

“That certain goods, forming part of the cargo laden on board The Lord Auckland, and subject to certain claims for freight, were,

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<sup>1</sup> [S. C. 3 Notes of Cases, 95.]

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The Lord Auckland. 2 W. Rob.

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under and by virtue of the act of parliament 3 & 4 Will. IV. [ \* 303 ] c. 57, s. 47,<sup>1</sup> \* deposited in the warehouses belonging to the East and West India Dock Company, and that at the time of such deposit notice was given by or on behalf of the owners of the said ship to the said company to detain the said goods on account of freight due in respect thereof; and that shortly after the said goods had been so deposited, they were demanded by, and were by the said dock company delivered to, the respective consignees thereof, upon deposit being made by the said consignees with the said company in pursuance of the said act of parliament, of sums equal in amount to the claims or demands made by the owners of the said ship for or on account of freight upon such goods respectively, such deposits amounting together to the sum of 318*l.* 11*s.* 11*d.* That the said deposits were paid to the said dock company, and received by them in pursuance of the act as aforesaid. That the claim for freight upon such goods has not been satisfied, and the consignees of the said goods refuse to consent to the said deposits being

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<sup>1</sup> "And be it further enacted, that all goods or merchandise which shall be landed in docks and lodged in the custody of the proprietors of the said docks under the provisions of this act, not being seized as goods forfeited to his Majesty, shall, when so landed, continue and be subject or liable to such and the same claim for freight in favor of the master and owner or owners of the respective ships or vessels, or of any other person or persons interested in the freight of the same, from or out of which such goods or merchandise shall be so landed, as such goods, wares or merchandise respectively were subject and liable to whilst the same were on board such ships or vessels, and before the landing thereof; and the directors and proprietors of any such docks at or in which any such goods or merchandise may be landed and lodged as aforesaid, or their servants or agents, or any of them, shall and may, and they are hereby authorized, empowered, and required, upon due notice in that behalf given to them by such master or masters, owner or owners, or other persons as aforesaid, to detain and keep such goods and merchandise, not being seized as forfeited to his Majesty, in the warehouses belonging to the said docks as aforesaid, until the respective freights to which the same shall be subject and liable as aforesaid shall be duly paid or satisfied, together with the rates and charges to which the same shall have been subject and liable, or until a deposit shall have been made by the owner or owners or consignee or consignees of such goods and merchandise, equal in amount to the claims or demands made by the master, owner or owners of the respective ships or vessels, or other persons as aforesaid, for or on account of freight upon such goods or merchandise; which deposit the said directors or proprietors of such docks, or their agents respectively, are hereby authorized and directed to receive and hold in trust until the claim or demand for freight upon such goods shall have been satisfied; upon proof of which, and demand made by the person or persons, their executors, administrators or assigns by whom the said deposit shall have been made, and the rates and charges due upon the said goods being first paid, the said deposit shall be returned to him or them by the said directors or proprietors or their agents on their behalf, with whom the said deposit shall have been made as aforesaid."

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The Lord Auckland. 2 W. Rob.

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paid to the owner of the said ship or vessel. That the said deposits cannot be considered as the freight due for the transportation of the cargo laden on board the said ship, or be dealt with as in any way the property of or belonging to the owner thereof, or subject to his order or disposition, inasmuch as the dock company frequently receive deposits equal to the amount of the sums claimed by the owner of the ship for or on account of freight, though there may be in fact less or nothing due to the shipowner, and under no circumstances whatever, save with the consent \* of the owner or consignee [ \* 304 ] of the goods, which has been refused in the present instance, as before alleged, could the company be authorized, entitled, or compelled to pay any portion of the said deposit to the owner of the said ship, &c. &c.

A short answer was given in to this act on petition, simply alleging that the sum of 318*l.* 11*s.* 11*d.* was not a deposit on account of the freight as alleged, but the actual freight itself, and that as such, or even as a deposit, the said sum was and is subject to the jurisdiction of the Court of Admiralty, in whosoever hands it might be found, and that the same ought to have been brought into the registry in pursuance of the monition issued on that behalf.

Subsequent to the act on petition being given in, the dock company were authorized by the consignees, who had made the deposit in question on account of freight, to pay the said deposit into the registry of the court. This, it was alleged in a rejoinder, had been done, and an application was now made to the court to dismiss the secretary of the East and West India Dock Company, and to decree his expenses to be paid by the holders of the bottomry bond, by whom the monition had been extracted.

In support of the application, *Jenner* submitted — That the East and West India Dock Company were only trustees for the parties by whom the deposit had been made, and that, without their sanction and consent, they had no election or alternative than to act as they had done in the present instance; that the words of the act of parliament were imperative upon the said dock company, and fully bore them out in the course which they had adopted; and that having acted entirely in uniformity with the act of parliament, they \* were entitled to be dismissed with the costs, more espe- [ \* 305 ] cially as the monition of the court had been complied with.

*Addams*, in support of the application, urged that the dock company were bound to have obeyed the court's monition in the first instance, and that having resisted the authority of the court, and hav-

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ing put the bondholder to the expense of the present proceedings, it was no justification to say at the last moment that the monition of the court had been obeyed; that notwithstanding the asserted compliance with the monition, they were bound to pay the costs.

PER CURIAM.

I have not now to decide the important question which was originally raised in the act on petition. The question is confined to a simple question of costs, and I certainly think it would not be consistent with prudence on my part, when the question of law has not been raised, to enter into it.

Now where freight is improperly withheld, and it becomes necessary to extract a monition against the party so withholding it, in order to compel him to satisfy a legal demand *prima facie*, undoubtedly the court would be disposed to condemn the party in all the costs and expenses occasioned by such detention. Where, however, a question of reasonable doubt may arise as to whether the person against whom the monition is prayed had good and justifiable ground for not obeying it, the court will not be inclined to visit on the party the penalty of costs, and more especially in a case where, as in the present instance, the parties believed at the time that they were acting in obedience to and in accordance with the provisions of

[ \*306 ] an act of parliament. Upon the present occasion I \* shall

give costs to neither of the parties before the court; but I wish it to be distinctly understood that, if upon any future occasion this question should be again litigated, I shall unquestionably give the costs against the party who may fail in the suit. This must be considered an ample notice with respect to the future intentions of the court in a matter of this kind; and although a proper degree of indulgence may fairly be shown upon the present occasion to persons placed for the first time in a doubtful situation, and hesitating to commit themselves to an infringement and violation of an act of parliament, yet should the subject be again mooted, the parties so mooting it must no longer expect to receive an extension of the same indulgence.

I dismiss the party, but without costs.

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The Glasgow Packet. 2 W. Rob.

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GLASGOW PACKET.<sup>1</sup> Nicoll.•  
June 3, 1844.

A salvage claim in part sustained and in part dismissed upon the ground that the salvors had misconducted themselves in the latter stages of the alleged service, by continuing to obtrude their services after they had been formally discharged by the owners. Full costs not allowed, but a sum *nomine expensarum* only given in consideration of the salvor's misconduct.

IN this case The Glasgow Packet having been run down whilst at anchor at Gravesend Reach, on the evening of the 30th November last, was towed close in shore upon the Essex coast, where she shortly afterwards sunk in about twenty-four feet of water.

The owner in London having been apprised of the accident, entered into an agreement with a Mr. Jones to weigh the vessel, and carry her into a place of safety, for the sum of 70*l.*, including all expenses.

In pursuance of this agreement, the said Mr. J. and his crew, consisting of eight persons, accompanied by the mate and crew of the schooner and a shipwright of the name of Stagg, proceeded from London to Gravesend, and arrived alongside the wreck about \*three P. M. of the 2d December, when they immedi- [ \* 307 ] ately set to work to raise the schooner, and having continued working thereat until the 10th, they finally succeeded in raising her and bringing her up to London.

Shortly after the accident, and before the sinking of the schooner, a number of Gravesend watermen put off to the schooner and tendered their assistance, and the master, being upon the point of proceeding to London with his crew to apprise the owners of the accident, agreed to employ two of the said watermen to assist the mate in keeping watch over the schooner during his absence, at the same time giving them a memorandum in the following words: — “ I, David Nicoll, leave charge of The Glasgow Packet to Mr. Spiers and James Groves.”

On the following morning, after the master's departure, the said S. and G. assisted by several other of the watermen, commenced getting up various articles from the schooner's deck, with boat hooks, and having procured two anchors, and hired barges and lighters from Gravesend, employed themselves in endeavoring to raise the schooner, until the arrival of Mr. Jones and his party from London.

Upon the arrival of Mr. Jones, they were immediately ordered by

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<sup>1</sup> [S. C. 3 Notes of Cases, 107.]



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Mr. White, one of the owners, to desist; but notwithstanding repeated assurances that their assistance was not required, they continued to hover round the schooner and obtrude their services, several of them even persisting in coming up to London in the vessel after she had been raised, although not permitted to do any thing on board.

An action was entered for alleged salvage services in the sum of 450*l.*, and the case was argued by

[ \* 308 ]    \* *Phillimore* and *Bayford*, for the salvors.

*Addams* and *Robinson*, for the owners.

#### JUDGMENT.

DR. LUSHINGTON. A service to a certain extent is admitted in this case by the tender which has been made on the part of the owners of The Glasgow Packet. In considering the extent of this service, and the reward to which it is entitled, I shall direct my attention to the following points:—First, when and under what circumstances the service in question actually commenced; secondly, what degree of merit ought to be attached to it; and lastly, when it ended. Upon the duration of the service of course much must depend, and my decision must be materially governed by the determination of that point. Now, in proceeding to the examination of these particulars, I must observe in the first instance that the mode in which the case has been conducted differs in some respects from the form which is ordinarily adopted in cases of this description. The original statement of the salvors on the one hand does not contain the whole of the case, but keeps back matters of considerable importance to the issue in the cause. On the other hand, the answer of the owners of The Glasgow Packet sets up as it were a different and independent case, and negatives by inference only, and not directly, the averments of the salvors. This manner of conducting a case, it is obvious, is most inconvenient, and entails upon the court the exercise of a more than common degree of care, in order to discover what is really in issue between the parties in the suit. The principle of pleading by act on petition requires that every important matter which is intended to be denied should be expressly negatived; and in conformity with this principle, when a fact is

[ \* 309 ] \* *averrèd*, and there is no contradiction of that fact, the court will *primâ facie* assume such an averment to be true.

If then the case of the owners of the vessel proceeded against in this cause should be prejudiced by the course which has been adopted in

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framing their defence, the court will lament the fact, but cannot protect them from the inconvenience which they have thus brought down upon themselves. I will now look to the commencement of the asserted service, and referring to the statement of the salvors themselves, it would seem that it commenced about eleven o'clock on the 30th of November, by the mate hailing two men of the name of Spiers and Allen, who were at that time approaching the vessel in their skiff James. The master, it is represented, was not on board his own vessel at this time, but on board The Margaret. And it is alleged that the mate having hailed the two men, he directed them to save what they could, and that it was done accordingly. Now this averment in the salvors' act on petition is confirmed by them upon oath, and it is not directly negatived in any manner whatever in the answer to the act. It is true that this statement, together with other similar and most important statements of the salvors, is met by a general averment on the part of the owners of The Glasgow Packet; but I must confess, that it is somewhat difficult to ascertain to what this general averment refers. I must therefore take it for granted that it was not intended directly to deny or contradict what was done by the mate, and the statement in question being supported by affidavits, I must proceed upon the ground that this was the commencement of the service, and if so, it was clearly a just and legitimate commencement.

It appears that shortly afterwards The Hope and The  
\* Confidence came up, and little seems to have been done [ \* 310 ]  
or to have been attempted until the master, who was  
about to proceed to London with all the crew, excepting the mate  
and another person, gives charge of the vessel to two of the salvors  
by delivering to them a written paper to the following effect:—  
“November 30th, 1843. I, David Nicoll, leave charge of The Glas-  
cow Packet to Wm. Spiers and James Groves.” A great deal of  
argument has been expended upon the nature of the charge so given,  
and the question arises upon what principles I am bound to construe  
the effect of this paper? I apprehend that it must be construed upon  
the same principles that prevail in the courts of common law with  
respect to written documents in general, namely, that their meaning  
and intention must be collected from the contents, and not from parol  
explanation. This is a cardinal rule, applicable, I conceive, to all  
cases, that, in considering written documents, of whatever descrip-  
tion they may be, no parol explanation shall be received. Evidence  
undoubtedly may be given as to the circumstances under which the  
document was written, as, for instance, that it was obtained by fraud,  
and in that case it becomes mere waste paper; or that certain par-

ticulars were agreed to be stated in the instrument, which have been improperly left out, and these may be restored; but no evidence whatever is admissible to explain what the parties said or merely intended, excepting they be reduced into writing at the time.

If it were otherwise, and it were open to parties on parol explanation to say that they did not mean that which the words import upon the face of them, it is perfectly obvious that all written documents would be rendered nugatory. Applying these principles [ \*311 ] \*then to the written paper, which was so delivered by the master in the present instance, the meaning of it in my judgment is, that the charge and care of the vessel was intrusted to the persons named therein; and that the charge so given must, in ordinary acceptation, be considered to convey an authority to do all that was necessary for the preservation of the property. If it had been intended that this charge was given for a specific purpose only, for instance, that it was merely an order to prevent plunder, and that the vessel was to remain in charge of the mate, the paper ought to have stated it. I cannot ingraft upon it any limitation which is not consistent with the ordinary plan and primary meaning. Assuming this to be the right construction of the paper, I must here observe that the fact of the master so giving charge of his vessel to these individuals, goes a great way to discredit the assertion that their services were altogether rejected in the first instance, and were actually forced upon the master. Surely, if the men had so misconducted themselves, the master would not have selected them in any manner whatever. He might, if he had deemed it necessary, have left more of his own men to perform the same duty. Upon these considerations then, I am of the opinion that the asserted salvors are entitled to a reasonable remuneration for their exertions from about noon of the 30th of November till some time on the 2d of December, when other occurrences took place, to which I shall presently have occasion to advert. Without referring in detail to what was done in the interval between the master's proceeding to London to consult the owners, and the arrival of Mr. Jones for the purpose of raising the vessel, I see no reason to disapprove of the measures pursued by the salvors.

[ \*312 ] According to my view \*of the case, whether intentionally or not, yet in point of fact they were intrusted with the charge of the vessel, and I do not think that they in any manner abused that charge. A tender of 9*l.* 12*s.* has been made for their services by the owners of The Glasgow Packet, and this tender, I think, *primâ facie*, is manifestly an inadequate compensation. Before, however, I finally adjudicate upon this point, I must look to the circumstances which subsequently occurred. It has been strongly urged by the

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counsel for the owners, that subsequent to the 2d of December, when Mr. Jones took charge of the vessel for the purpose of raising her, the salvors most grossly misconducted themselves in retaining possession, and forcibly continuing their services after they had been formally and positively discharged by the owners. The question arises, whether at any time and when they were so discharged and prohibited from further interference in the vessel? Now it is beyond all doubt, that they were so discharged upon the 2d of December, when the person hired to weigh the vessel had arrived, because it is distinctly admitted by the salvors themselves in their reply; and the only difference between them and the owners upon this point, is in the time of day when the discharge was given. They say indeed that no payment for their services was offered at the time they were discharged; be it so; this circumstance would not be a sufficient justification of such misconduct upon their part. In some cases, it is true, salvors have a right to retain possession to secure for themselves the compensation which may be due. But such rule has no place here, for here there was no possession acquired by a complete salvage service; and what is a still more important fact (for it is the foundation upon \* which salvors are at any time allowed to retain [ \* 313 ] possession) there was no necessity for retaining the ship to secure the demands upon the owners, for the ship could not by possibility, under the circumstances, have escaped the process of this court. Again, it has been suggested, in vindication of their resistance, that they themselves considered the further continuance of their services necessary for the final preservation of the vessel; a ground of defence which, in my judgment, is still less tenable and satisfactory. In ordinary cases, when the assistance of one set of salvors has been accepted, and they are competent to fulfil the service which they have undertaken, they cannot be dispossessed by subsequent salvors.<sup>1</sup> But this principle has no application to the present case. Here the vessel was actually sunk, and it was impossible for the salvors to have raised her by their own unassisted exertions. And moreover, the owners were upon the spot to give the orders which they deemed best for the preservation of their own property.

It would, I conceive, be a most dangerous doctrine to hold that, in the river Thames, any set of persons can be at liberty to supersede the authority and overrule the discretion of the owners of the ship, as to the preservation of that which is most valuable to themselves, — their own property. Looking, then, at the circumstances which

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<sup>1</sup> [Abb. on Ship. (Am. Ed.) 557, note.]

occurred after the arrival of Mr. Jones, upon the 2d of December, I consider that the conduct of the salvors, subsequent to that period, was exceedingly reprehensible; and I certainly shall not allow them any compensation for the services, (if they are to be called services,) improperly obtruded upon the owners of this vessel. At the same time, I think that a complete mistake has been made by [ \* 314 ] the \* owners, with respect to the merits of the salvors in the earlier stages of the transaction, in considering the service which was rendered an ordinary tidework service. I hold it to be service of a very different degree and description. The course which I shall adopt is this:— I shall pronounce against the tender of 9*l*. 12*s*., which I deem to be insufficient for the services from the 30th of November to the 4th of December, and I shall decree to the salvors the sum of 40*l*. With respect to the question of costs, the regular course, perhaps, would be to give the salvors their costs up to that time, and to condemn them in the subsequent costs. It would, I apprehend, be somewhat difficult, if not impossible, to work out with accuracy the precise amount of their separate costs. I shall therefore, believing that the costs of the first period ought to be greater than the latter, decree to the salvors the additional sum of 20*l*., *nomine expensarum*. I cannot close this judgment without adverting to two affidavits made by a person of the name of Neale. The first of these affidavits swears, amongst other things, that the schooner could not have been raised unless a greater number of persons had been employed than were provided by Mr. Jones. The clear meaning of which is, that without the additional assistance of the salvors subsequent to the 2d of December, the salvage service could not have been effectually completed.

In a subsequent affidavit made by this same individual, upon the 5th of March, he swears in these words:— “That the barges, lighters, and apparatus, with deponent and the other men employed by the said Benjamin Jones, were amply sufficient for raising the said schooner.” To these affidavits it is unnecessary to [ \* 315 ] state that the court has not paid the slightest \* attention, in forming its judgment upon the present occasion. I am not, however, disposed to let the case rest here. It is of the last importance that swearing of this description should be prevented; and I shall take into my most serious consideration the propriety of submitting to the Lords Commissioners of the Admiralty, whether it will not be advisable that they should direct their solicitor to prosecute this person, and all other persons who so attempt to pervert the course of justice.

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The Emma. 2 W. Rob.

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THE EMMA.<sup>1</sup>

June 3, 1844.

Rule laid down by the court, respecting the production of protests, namely, that in all cases of salvage they ought to be brought in. In cases of salvage, it is the usage of the court to take the whole value of the ship and cargo, and assess the amount of the remuneration upon the whole, each paying its due proportion. Not competent to parties to aver that the services were of greater importance to the ship than they were to the cargo; and, therefore, that the ship should bear the greater burden, or *vice versâ*. Tender overruled.

THIS was a cause of salvage, promoted by twenty-two boatmen of Margate, for services rendered to this vessel in assisting to get her off the Nayland Rock.

The admitted value of the ship was 580*l.*; the value of the cargo and freight, 3,000*l.* A tender of 60*l.* was made by the owners of the ship, and accepted by the salvors. As regards the ship, therefore, the salvage had been settled out of court.

A tender of 250*l.* was also made by the owners of the freight and cargo, but was refused.

In the course of the argument it was contended, on behalf of the owners of the cargo, that the criterion of the salvor's services, *quoad* the extent of the remuneration for the same, had been in a great measure fixed by themselves, by the sum which they had consented to receive for the salvage in question from the owners of the ship, namely, twelve per cent. upon the value of the ship. That if this sum was, in the salvor's estimation, an adequate remuneration for their services to the ship, which stood the most in need of \* their assistance, the tender of 250*l.* for the freight and [\* 316] cargo was proportionately a most liberal tender, under the circumstances of the case, and ought to be sustained, the cargo consisting of timber, which could not be deteriorated or damaged by being wetted in the water; that the court was bound to take this circumstance into its consideration, and adjudge the *quantum* of remuneration according to the real extent of the service which had been rendered to the portion of the property under litigation, without reference to, but separate and distinct from, the benefit which had been conferred upon the owners of the ship by the salvors' exertions. No protest was brought in, and the learned judge, in over-

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<sup>1</sup> [S. C. 8 Notes of Cases, 114.]



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ruling the tender and awarding the sum of 340*l.*, in the course of his judgment, observed to the following effect: — “ In proceeding to the consideration of this case, I cannot but notice, with some degree of suspicion, that no protest has been produced on behalf of the owner of the vessel proceeded against. Looking to the facts and circumstances of the case itself, it is certainly a case in which, according to ordinary experience, a protest would have been made, and, if made, it should undoubtedly have been brought in. The non-production of such protest, in the present instance, becomes the more extraordinary, when I look to the affidavits which have been sworn by the master and mate of The Emma; the affidavit of the latter being infinitely fuller and more comprehensive than that of the former. (Court referred to the affidavits, and proceeded to observe) — I will here avail myself of the opportunity to express my opinion, with respect to the production of protests in general in this class of cases. According to my own experience in this court, I have always understood the rule and practice of the court to be, and I [ \* 317 ] am now \* applying it to cases of salvage, that the protests in all cases ought to be brought in; and for the following reasons: — In the first place, because every protest is presumed to be made *recenti facto*, and to contain a statement of the transaction, when the facts are fresh in the memories of the parties deposing to it; whereas the discussion and legal investigation of those facts, and of the evidence taken upon them, cannot be had until a much later period, when even those who are most inclined to speak with the most perfect accuracy as to the nature and extent of the salvage service may find their memory fail them, with respect to certain important points. This is one reason why the production of the protest is required, and ought to be observed. Another, and in my view of it a most important reason why the protest should be produced, is this, namely, that it is made and sworn *alio intuitu*. In the argument which was addressed to the court by one of the learned counsel, Dr. Addams, this circumstance has been adverted to, and ingeniously applied as a justification for keeping the protest back upon the present occasion. I cannot, I confess, accede to the argument which was so urged upon the court. The first and primary object for which all protests are made, is to found a claim upon the underwriters for damage done. It is clear, therefore, that it is the object of the parties to state all the facts, and every thing which has happened to the ship, so as to lay the foundation for the most extensive indemnification. When they come before this court, on the other hand, for the purpose of adjusting the amount of the reward, then the state of things is reversed; the extent of the danger is decried;

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the nature and extent of the damage is depreciated. Upon these considerations, therefore, it is most desirable, and much more so in \*cases of salvage than in cases of collision, that [ \* 318 ] the protest should always be produced. I will now, before I advert in detail to the particular circumstances of this case, notice an argument which has been strongly pressed upon the court by the learned counsel for the owners. It is admitted that the owners of the ship have made an arrangement with the salvors out of court, and have paid the sum of 60% upon a value of 500%, being twelve per cent. upon the value of the ship; and, in order to induce me not to adopt the conclusion that this arrangement furnishes a fair criterion of the salvors' claim upon the whole of the property which has been salvaged, it has been contended that, although this sum may be a fair proportion of remuneration, as regards the service rendered to the ship, yet that, in this case, there is a distinction between the services which have been rendered to the ship and to the cargo; that, in consequence of the nature of the cargo, the services rendered to the latter are of a weaker kind, and that a less rate of salvage is consequently due for the preservation of the cargo than for the rescue of the ship. Upon this part of the argument I must observe, in the first place, that my decision cannot be in the slightest degree ruled or governed by any thing which has been done out of court between the salvors and the owners of the ship. I must look at the case as if no such agreement had taken place. It is obvious that this is the correct course to be adopted; from the consideration that, in a case of this description, many reasons may exist why, though the act is done by the common consent of the parties, it may not form a fair estimate of the real value of the service to be rewarded. For instance, as in this case, the small value of the ship, and the desire to get the matter expeditiously settled without awaiting the \*decision of this court, in order to avoid the expense of liti- [ \* 319 ] gation, both these considerations may be sufficient to have influenced the motives of the parties between themselves, in making the arrangement in question out of court; at the same time, it is clear that they can furnish no safe rule for the guidance of my judgment upon the present occasion. It was urged, in the conclusion of the speech of the learned counsel who last addressed the court, Dr. Bayford, (and the argument, if founded on truth and the ancient law and practice of the court, would undoubtedly lead to important results,) that the court, in determining this question, was bound to look to the services which had been rendered to the ship and cargo separately and apart; and much stress was laid upon the nature and

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The Lord Cochrane. 2. W. Rob.

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description of cargo, and its non-liability to damage from its immersion in the water.

Now in this class of cases the ordinary usage of the court, which is well known to every person who has practised in it, is to take the whole value of the ship and cargo, and assess the amount of the remuneration upon the whole, each paying its due proportion. I am not aware, excepting in the instance of silver or bullion, that any distinction has ever been taken, or that parties have been permitted to aver, that the services were of greater importance to the ship than they were to the cargo, and, therefore, that the ship should bear the lesser burden, or *vice versa*. Such a distinction, if acknowledged, would in many cases lead to intricate litigation and to questions of great nicety, which it would be exceedingly difficult for the court to adjust. With respect to silver and bullion, it is true that a distinction is wisely and properly permitted, and this upon the consideration that it is more easily rescued and preserved than more bulky articles of merchandise. The mode then upon which I shall form my estimate in this case will be to add the 580*l.*, the value of the ship, to the 3,000*l.*, the admitted value of the cargo, and to fix the amount of the reward out of the whole 3,580*l.* each part, of course, bearing its proportion. In this view of the case I award the sum of 320*l.*

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THE LORD COCHRANE,<sup>1</sup> Smith.

June 21, 1844.

Bottomry bond given at Pernambuco upon the ship, freight, and cargo, resisted by the consignees of the cargo, upon the ground, 1st. That the advances were made by persons acting in the capacity of ship agents at the time the bond was given; 2dly, That the disbursements were made with the understanding that they should be covered by bills of exchange upon the owners of the ship; 3dly, That the repairs upon the vessel were improvidently undertaken, and the vessel should have been sold, and the cargo transhipped. Objections overruled, and the bond sustained.

THIS was a question as to the validity of a bond of bottomry, purporting to bind the ship, freight, and cargo. The bond was not disputed by the owners of the ship and freight, but was contested by the owners of the cargo.

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<sup>1</sup> [S. C. 3 Notes of Cases, 172.]

The ship, it appeared, the property of Messrs. Benson, merchants, of London, sailed in the spring of 1839 from London, bound for the island of Ascension, with government stores, and thence to Pernambuco, in the Brazils, in search of a freight, with directions to the master from the owners to apply to the house of M'Calmont & Co., and to put the ship under their charge upon his arrival at Pernambuco. Having arrived successively at Ascension and Pernambuco, the Messrs. M'Calmont & Co. took charge of the vessel, disposed of the remainder of the outward cargo, and procured her a cargo of cotton and sugar for the homeward voyage to England, debiting the owners in the sum of 882*l.* 13*s.* 2*d.*, for which sum the master drew a bill in their favor, and which was accepted and paid upon its being presented in England. In leaving Pernambuco, the vessel met with an accident, by grounding on a sand bank beside the bar at the entrance of the harbor, and sustained such \*damage that [ \* 321 ] she was obliged to put back for repairs. The necessary surveys having been made in the presence of Lloyd's agent, the repairs were undertaken and completed under the directions and upon the responsibility of M'Calmont & Co.; and upon the 20th January, 1840, the bond in question was given by the master to the amount of 8,558*l.* 12*s.* 4*d.*

The vessel arrived at Liverpool in the month of March, 1840, and, having been arrested upon this bond, was abandoned by the owners, and sold under the process of the court. The proceeds of the sale, amounting to the sum of 1,675*l.* only, were brought into the registry. The freight amounted to the sum of 1,685*l.* 18*s.*, and there was also an additional sum of about 430*l.* on goods shipped by the Messrs. M'Calmont themselves, leaving a sum of 4,918*l.* to fall upon the cargo.

On the part of the consignees of the cargo, it was in substance alleged, by way of answer to the act on petition, that the house of M'Calmont & Co. were the regular agents of the owners, and in that capacity they had made all the disbursements prior to the first sailing of the vessel from Pernambuco; that this character was resumed by them upon the ship's return, and continued during and throughout the whole remainder of the ship's detention at Pernambuco; that as regular ship agents they did, or caused to be done, all the repairs to the said ship consequent upon the damages she had sustained; that the whole of such repairs were done, and the whole materials supplied, by persons whom they employed, and whom they paid and became responsible to for such work done; and that it was distinctly understood between the master and the said M'Calmont & Co. that

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their disbursements or liabilities for and on account of the [ \* 322 ] same \* should be covered as before by a bill to be drawn by the master upon his owners; that the house of M'Calmont, as the expenses of the repairs increased, foreseeing that the amount would probably be such as would prevent the owners from accepting any bill drawn by the master, prevailed upon the master to sign the bond in question; that the repairs were improvidently undertaken, and that the ship ought to have been abandoned and sold by the master, and the cargo transshipped and forwarded; and the conduct of Mr. S., who had acted throughout the transaction on behalf of M'Calmont & Co., was characterized by an unfair desire on his part to carry out the interests of his employers at the expense of the owners of the ship and cargo, and was altogether unjustifiable under the circumstances of the case, &c.

These averments were counterpleaded and denied in a rejoinder brought in by the bondholder, and a surrejoinder and also a rebutter were given in.<sup>1</sup>

For the bondholders, *Harding* and *Elphinstone*, in opening the case, contended — That the master was without funds or credit, and although his necessities were publicly advertised at Pernambuco, [ \* 323 ] buco, no one came forward willing to make \* the advances that were required; that Mr. Saunders, the managing agent of M'Calmont & Co., the holders of the bond, was voluntarily selected by the master, in the exercise of his discretion, as the person in whose hands to place his ship, and that from the very commencement of the transaction there was a mutual agreement between Mr. S. and the master that a bottomry bond should be given; that there was no departure from this understanding at any period during which Mr. S. was engaged in the affairs of the vessel, and that the repairs were undertaken not only under the inspection of the master, but with the concurrence of Lloyd's agent at Pernambuco; that the shippers of

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<sup>1</sup> It may be stated, by way of explanation of the delay that has apparently taken place in bringing this cause to a final hearing, that the action in the cause was entered upon the 19th March, 1840, and upon the 29th of February, 1841, it being considered by the consignees of the cargo and their advisers that more effectual evidence could be obtained by carrying the suit into the Court of Chancery, an injunction was issued to restrain the Court of Admiralty from further proceeding in the cause. The principal cause was in consequence suspended in this court, and it was not until the commencement of the year 1844 that by mutual agreement both parties consented to abandon the proceedings in the Court of Chancery, and resume the suit in this court. — Ed. note.

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the cargo, who were resident upon the spot, were all of them cognizant of the transaction, and might have interfered if they had thought fit so to do, as was also the son of Mr. Benson, the owner, who expressly sanctioned the proceedings; that the cargo, a valuable cargo of 23,000*l.* in value, had, through the advances made by the house of M<sup>c</sup>Calmont, been safely brought to its port of destination, and that the delay occasioned by the present refusal on the part of the consignees of that cargo to pay their proportion of the bond, which was undisputed by the owners of the ship and freight, and both of which had been made available in part, was vexatious and unjust; that having carried the matter from this court to the Court of Chancery, they now come back after the delay of two years, and that the principal objections upon which they relied, it would appear from the pleadings in the cause, rather referred to matters of account, which could not affect the validity of the bond, but which belong to the investigation of the registrar and merchants.

\*For the consignees of the cargo, *Addams* and *Bayford* [ \* 324 ] submitted — That the abandonment of their own interests by the owners of the ship and freight did not affect the right of the consignees of the cargo to dispute the validity of the bond, and that they were perfectly justified in the course which they had pursued under the circumstances of the case; that the reason for resorting to the Court of Chancery was, that the parties opposing the bond considered that by so doing they were more likely to obtain the necessary evidence, and in that view they had not been mistaken; that no unfavorable judgment had been pronounced against them in that court; on the contrary, that the Lord Chancellor had expressed a strong opinion upon the case, as full of suspicion, and requiring a strict investigation, and that they had been driven to return to the Court of Admiralty by the fact that since giving bail in this court circumstances had occurred which rendered it inconvenient for them to furnish the necessary security demanded by the Court of Chancery. That prior to the decision in the case of *The Gratitude*,<sup>1</sup> it was a *vexata questio* in this court whether a master, under any state of circumstances, could legally hypothecate the cargo committed to his care. That the judgment of Lord Stowell in that case clearly established that, in order to justify him in so doing, the circumstances of the case must be special, the exigencies of the master most extreme and stringent, and that these did not exist in the present instance. That

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<sup>1</sup> [ 3 C. Rob. 240.]



the instructions from Mr. Benson, the owner, to the master of the vessel, and his conversation with Mr. Nowell prior to his departure from England, clearly showed that Mr. Benson himself considered that, upon the arrival of the ship at \*Pernambuco, she would be put in the hands of M'Calmont & Co; and that for the purposes of this suit, the vessel must be considered, if not in terms at least in effect, to have been regularly consigned to that house. That the whole *res gestæ* of the case, prior to the accident which compelled the vessel to return to Pernambuco for repairs, established upon M'Calmont & Co. the character of agents for the owner, and that this character was resumed upon the return of the vessel, and continued throughout the whole transaction. That the advances having been made by them for the service of the ship in that capacity, they were not entitled, under the authority of the decision in *The Hero*, to turn round upon their employers at the last moment, and cover such advances under the security of a bond of hypothecation, as they had done; at all events, not without giving fair notice to the master that they would give no further credit to the owner, and thus enabling him to go elsewhere for the money that might be required. That no such notice was given upon the present occasion, and there was no evidence whatever before the court to show that, upon a proper application from the master, money could not have been obtained elsewhere from other houses at Pernambuco. That the contrary was to be presumed, from the very high character and mercantile credit enjoyed by Mr. Benson in this country. That under the circumstances of the case, the master was bound to have communicated with the shippers of the cargo in the first instance, and should also have corresponded with the owner and consignees in England; neither of which measures had been adopted, and the whole transaction appeared to have been carried on in [ \* 326 ] secrecy between the master and Mr. Saunders, the \*managing agent of M'Calmont & Co., and whose conduct was characterized throughout by great improvidence and want of proper discretion and circumspection. Lastly, that the master might and should have transhipped his cargo and sold his vessel, which would have been infinitely more advantageous in regard to the interests of all parties concerned, than incurring the ruinous expenses which have been encountered. That the charges for these repairs and other claims in the accounts were upon the face of them exorbitant in the extreme, and that although it was unquestionable that the bonds of bottomry, when fair and upright in their character, were to be upheld with a strong hand by the Court of Admiralty, the court was bound to discountenance them when tainted with suspicion in all their cir-

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cumstances, as this bond was, especially as regards the hypothecation of the cargo, in the present instance.

The court, without calling upon the counsel for the bondholders in reply, gave judgment to the following effect: —

**JUDGMENT.**

**DR. LUSHINGTON.** I have carefully read over the papers in this case before I came into court, and the original impression upon my mind with respect to the validity of the bond in question has not, I confess, been removed by the arguments which have been addressed to the court upon the present occasion.

The bond which is upon the ship, freight, and cargo, has not been disputed by the owners of the ship and freight. As far as their interests are concerned, a judgment by default has already been pronounced by the court. The payment of the bond has, however, been contested on behalf of the owners \* of the cargo, [ \*327 ] and they are undoubtedly entitled, notwithstanding the acquiescence of the owners of the ship and freight, to avail themselves of any defence competent to them by law. The question, then, which I have to determine, is how far the objections of the owners of the cargo are legally borne out under the circumstances of the case. Now the first ground upon which the opposition to this bond has been rested is the denial of that stringent necessity which it is said will alone justify the master of a vessel in including, in a bond of bottomry, the hypothecation of the cargo intrusted to his care. In support of this part of the argument, the court has been referred to the case of *The Gratitude*,<sup>1</sup> and it has been contended, upon the authority of the decision in that case, that in order to justify the hypothecation of the cargo, the circumstances of the case must be special, the nature of the necessity extreme and urgent; and where these do not exist, the bondholder has no right to extend his security for the repayment of his advances by including the cargo in his bond of bottomry. Now it is apparent to my mind, that in all cases of this kind, the measure of the necessity must be governed by the degree of damage which has been done, and the extent of the advances which may be required for the repairs. The greater the damage, the larger the expense, the greater will be the necessity for including the cargo in the bond of hypothecation, and for this plain and obvious reason, that the ship and freight may be inadequate to discharge the bond,

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<sup>1</sup> [3 C. Rob. 240.]

or it may happen, as has frequently occurred in these courts, that the vessel, though amply sufficient in value for the amount of the bond at the time the bond is given, from subsequent misfortunes may [ \* 328 ] be wholly insufficient to discharge the payment upon \* her arrival at her port of destination. Looking to these contingencies, it is not unreasonable that the bondholder should require the cargo to be called in in aid of his security, and on legal principle I conceive he has a perfect right so to do. I apprehend the doctrine of law to be, that persons who advance money upon bottomry, whatever may be the amount which they undertake to advance, however they may look in the first instance to the value of the ship and freight, are fully entitled, if they think fit, to demand the additional security of the cargo, and to bind all three under the obligation of the bond for the repayment of the money advanced.

I will now address myself to another ground of objection which has been strongly pressed in the argument on behalf of the parties opposing the bond, namely, that Mr. Saunders, at the time he made the advances, was acting in the capacity of agent to Mr. Benson, the owner of the ship. Is this borne out by the facts of the case? It appears, indeed, that Mr. Benson, upon the departure of the vessel from this country on a voyage to Ascension and thence to Pernambuco, gave certain directions to the master for the guidance of his conduct upon her arrival at Pernambuco, and amongst those directions the master was instructed to address himself to the house of M'Calmont & Co. at that place. It does not appear, however, that Mr. Benson himself caused any intimation to be made to that house that he adopted them as his agents, or that he would honor their bills; nor does the master go out with any letters of credit upon the house at Pernambuco or any one else; but it is said that for the purpose of this suit the vessel must be considered to have been virtually consigned to the house of M'Calmont & Co., inasmuch that, [ \* 329 ] prior to \* the departure of the vessel from England, a conversation took place upon the subject between Mr. Benson, the owner, and Mr. Nowall, one of the partners in a firm in London, in connection with the house at Pernambuco, and that the result of that conversation left upon Mr. Benson's mind the impression that the vessel, upon her arrival at Pernambuco, would probably be put into the hands of M'Calmont & Co. It is by no means clear from the evidence in the cause how far this impression was entertained by Mr. Nowall, or communicated by him to the firm in London to which he belonged; it is, however, unnecessary for the purpose of this discussion to pursue the inquiry upon the point. Assuming that the vessel was consigned to the house of M'Calmont & Co. as suggested, and

that they took upon themselves the character of the ship's agents by performing all that was incumbent upon them in that capacity, what follows? They faithfully discharge their obligation to the ship by procuring her a full cargo, themselves being amongst the largest shippers, and having defrayed the expenses, they draw upon Mr. Benson for the amount, and the transaction is concluded by the sailing of the vessel on her homeward voyage to England. It has, however, been urged that the vessel, soon after leaving port, met with an accident which compelled her to return to Pernambuco for repairs; and it has been much discussed in the argument that upon the return of the ship to Pernambuco the agency was resumed by the firm of M'Calmont & Co. In my view of it, even assuming that the agency was resumed, as is contended on behalf of the owners of the cargo, this fact would not affect the legal bearing of the question which I have to determine under the circumstances of the case. Upon the return of the \*ship frequent surveys are held upon her, and [ \* 330 ] these surveys, it appears, take place under the immediate inspection of the agent for Lloyd's at Pernambuco. In thus calling in the assistance of Lloyd's agent, I cannot but think that the master and the house at Pernambuco acted with great prudence and propriety, inasmuch that it is generally considered in this court, and I apprehend most properly, that one of the greatest safeguards for the integrity of transactions of this nature, is a recurrence to Lloyd's agent, who must be presumed to be selected for his situation from his general respectability and experience. From the affidavit of Mr. Saunders, it further appears that it was not until the end of August that the real extent of the repairs that were necessary, and the amount of the expenses to be incurred in those repairs, were correctly ascertained; and at the request of the master, Mr. Saunders, on behalf of the firm of M'Calmont & Co., thereupon gives the necessary directions for enabling the ship to accomplish her voyage to England. The question then arises, did Mr. Saunders make the firm of M'Calmont & Co. responsible for one sixpence of those repairs upon the personal security of the owners? I conceive not, and I am confirmed in this opinion when I look to the affidavit of Mr. Saunders, which is before the court. In that affidavit Mr. Saunders deposes to this effect: "That previous to the commencement of any of the repairs, and before he had made or undertaken to make the firm of M'Calmont & Co. in any manner liable or responsible to any person whatever for the expenses of any of the repairs, it was distinctly understood and agreed by and between the master of the ship and himself, on behalf of the firm of M'Calmont & Co., that the master should, previously to the sailing of the vessel, \*execute a bottomry [ \* 331 ]

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bond at the usual rate of maritime interest." The statement which is thus made upon oath by Mr. Saunders, it is to be observed, is not met by any counter evidence on the other side, and is not contradicted by any one fact or circumstance in the cause. I must consequently hold that it is entitled to the credence of the court, and if so, I am at a loss to understand upon what grounds it can be contended in the face of this statement that due and sufficient notice was not given to the master that any advances which might be made in the prosecution of the repairs were to be made, not upon the personal responsibility of the owners, but upon the security of the ship. It has been argued that, notwithstanding this notice, the firm of M'Calmont & Co. having once taken upon themselves the character of agents, could not divest themselves of that character and assume the privilege of strangers, by demanding the security of a bottomry bond for the advances they were called upon to make in the service of the ship. Looking to the reported decisions of this court, I cannot accede to the propriety of the position. The doctrine of law laid down by Lord Stowell I apprehend to be this,—that it is no part of the duty of an agent to advance money without a fair expectation of being reimbursed; and if he thinks fit to hold hard and secure his repayment upon a bottomry bond, he is at liberty so to do, provided he gives notice that he will not make the advances as agent and affords the master the opportunity of trying to get money elsewhere. This is the principle laid down by Lord Stowell in the case of *The Hero*,<sup>1</sup> to which a reference has been made in the argument; and the principle was carried out by the same very learned judge in [ \* 332 ] the case of *The Augusta*,<sup>2</sup> where \*some of the advances having been made by the consignee of a ship upon the personal security of the owner, and other advances upon the sole security of the ship and freight, Lord Stowell pronounced against the validity of the former, and decided in favor of the latter, as coming fairly within the scope of a bottomry transaction.

In the course of the argument great stress was laid upon the high character and mercantile credit of Mr. Benson in this country, and the case was in some degree argued upon the assumption that his character must have been so fully known, and his credit so far available in Pernambuco, that the necessary funds might have been procured upon his personal security alone, without having recourse to a bottomry bond at all.

Without intending the slightest disparagement to the character of

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<sup>1</sup> [2 Dod. 139.]

<sup>2</sup> [1 Dod. 283.]

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this gentleman, I must observe, that the question which I am called upon to decide is not the responsibility of Mr. Benson, or his ability to meet the payment of any bills that might have been drawn upon him, but how far under the circumstances of the case it is probable that the house of M'Calmont, or of any other person at Pernambuco, would have been content to advance the money upon the sole chance of repayment from Mr. Benson, who had taken care that no person on his account should render him responsible for a single farthing, and who does not appear to have had any correspondence with, much less to have authorized, the house of Pernambuco to draw upon him for one sixpence. As far as I am competent to form any opinion upon the subject, I must say that all the circumstances of the case strongly tend to establish upon my mind the conviction that the advances in question were made upon a bottomry consideration. Notifications \* were posted up in the place of greatest publicity, [ \* 333 ] by means of which the shippers of the cargo, according to the evidence in the case, must have been cognizant of the fact. There were also subsequent advertisements inserted in the newspapers, and it is not pretended that any person came forward in answer thereto, who was willing or desirous to make the requisite advances. I now come to another point in the case which has been much commented upon, namely, the conduct of the master with reference to the shippers of the cargo. It has been said, that it was the duty of the master, before he gave a bottomry bond upon the cargo in this case, to have communicated with the shippers in the first instance, and to have taken their directions; this observation, it is obvious, must be subject to great limitation under the circumstances of the case. The shippers, it is to be noticed, were resident on the spot: and it is perfectly true, that if they had been kept in ignorance of the intended bottomry transaction, it would have been a strong argument against the *bona fides* of the master, that he had not put himself into communication with them. It is obvious however, in the present instance, from the facts spoken to in the affidavits, that these shippers must have been cognizant of the transaction in question; and if they had deemed it expedient for their interests to interfere for the protection of the cargo, they had the opportunity, and were at perfect liberty so to do. It appears, however, that only one or two of these individuals, and those possessing the slightest degree of interest, in any manner interfered or took any share in the matter. In my opinion this indifference was a virtual acquiescence in the master's proceedings, and is much the same thing as if a communication had taken place between the \*master and \*themselves, and their answer had been—we will have [ \* 334 ]



nothing to do with the matter, you must act according to your own discretion.

Pursuing the investigation a little further, let us now see what were the alternatives offered to the master under the circumstances in which he was placed. It has been said, that he might have transhipped the cargo immediately upon his return to Pernambuco; perhaps he might; but has any authority been cited to show that he was bound to do so? I am not aware that any such obligation exists, according to any known rule of the maritime law, and looking to the particular circumstances of the case under consideration, it would, I conceive, have been a dangerous expedient for him to have resorted to this step in the first instance, before he had ascertained the amount of the expense that would be necessary for the repair, and had clearly seen his way to the equitable protection of all persons concerned in the ship, freight and cargo, severally, whose interests were equally intrusted to his care. Again, it has been stated, that he might have corresponded with the owner and the consignee of the cargo in England. What would have been the consequence of such a mode of proceeding? The consequence would have been, that the ship and cargo would have been locked up for a period of three months, and at the expiration of that time, he would probably have been left to the exercise of his own discretion. One other alternative has been suggested, and that is, that he might have sold the ship.

As a general position of law, it is not to be denied that in a case of necessity the master is invested with an authority to sell his vessel but this authority, I apprehend, is strictly limited, and could [ \* 335 ] alone be justified \* in case of very extreme emergency, the mere extent which it would be almost impossible to define beforehand.

Granting that he might, I have yet to learn that such a measure would have been proper or expedient under the circumstances. A sale of a vessel at Pernambuco, abandoned by the master as unseaworthy—a sale not sanctioned by Lloyd's agent—what sort of a title would the purchaser have received, and what sort of a price would the owner have obtained? It is not to be denied, that under certain circumstances the master of a vessel, in the exercise of the discretionary authority with which he is invested, may sell and dispose of the ship, but this power I conceive to be strictly limited by law, and is only to be exercised under emergencies of great stringency; emergencies which it is almost impossible to perceive beforehand, and which I shall not attempt to define in the present instance, because I am perfectly satisfied in my own mind, that there

is nothing in this case which would have justified the master in having recourse to such a proceeding.

It only remains that I should very briefly advert to one or two further observations which have been thrown out by the learned counsel who have argued the case on behalf of the owners of the cargo. It has been said that the charges for the repairs in question are upon the face of them exorbitant; and that a bill of exchange might have been drawn by the master upon Mr. Benson, the owner of the ship, and that such bill would have been assuredly discharged upon the presentation in England. Now supposing that such bill of exchange had been drawn and taken by Mr. Saunders, in addition to the bond of bottomry, would that in any measure have affected the validity \* of the bond in question? Clearly [ \* 336 ] not. It is a matter of daily notoriety in this class of cases, that persons advancing the money are in the habit of receiving bills of exchange, by way of collateral security for the repayment of the bond of bottomry. If the bills of exchange are paid, the bond of course is not sued for. The general validity of the bond, however, is in no degree impaired by the additional security by which it is accompanied, and, if necessary, it may be enforced by proceedings in this court, in the same manner as if no such collateral security had been given.

With respect to the charges made for the repairs and the other items in the bond, if these should be excessive or contrary to the usage and custom of merchants, and against sound principles of justice and equity, the remedy is to refer them generally to the registrar and merchants, and have them cut down according to their decision, subject to the opinion of the court. As far as I am enabled to form an opinion upon them, I must say that they do not strike me as being excessive; if they be, it is a matter for the consideration of the registrar and merchants, and not for the determination of the court in the present instance. The same observation applies to the premium that has been demanded upon this bond. The court has never been in the habit of pronouncing against the validity of a bond on account of excess of premium, and I well remember a case in which I myself was counsel, where Lord Stowell expressly laid down that it was a matter of reference to the registrar in all cases in which the premium was disputed, because the amount of such premium must at all times depend upon a variety of circumstances, which the court could not take upon itself satisfactorily to decide.

As some imputation against the *bona fides* of Mr. Saunders \* was thrown out in the earlier stages of the cause, [ \* 337 ] although no longer contended for in the argument, I con-

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The Volcano. 2 W. Rob.

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sider myself bound in justice to that gentleman to conclude my observations by expressing my conviction that there was nothing whatever fraudulent in any part of this transaction. On the contrary, I think the conduct of Mr. Saunders, who acted in the business for M'Calmont & Co., is marked throughout by a strong desire on his part to do his duty fairly between all the parties. I think the correspondence is every thing it could be desired that it should be. I have only to express my regret, that circumstances have taken place which have for so long a period delayed the right of the parties who are entitled to recover the amount of the bond.

I pronounce for the bond, with the costs.

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THE VOLCANO,<sup>1</sup> M'Illwaine.

July 5, 1844.

Commander of a queen's ship condemned in a cause of damage, the collision having been occasioned by his anchoring too near the damaged vessel; and having anchored with only one anchor down, the weather being squally and tempestuous at the time.

THIS was a proceeding in a cause of damage, promoted by the owners of the brig Helen against the commander of her Majesty's steam-ship The Volcano.

The Admiralty Proctor having appeared by authority of the Lords of the Admiralty on behalf of the commander of the steamer, an act on petition was given in, in substance stating that The Helen, of 116 tons, whilst in the prosecution of a voyage from Catanea to Glasgow, upon the 27th February, 1839, was driven by stress of weather and compelled to anchor in Mahomet's Bay, on the coast of Spain. That about noon on the following day The Volcano, with a mail and passengers from Malta, was likewise compelled to seek [ \* 338 ] shelter in the same bay, and having \*taken up a berth about two cables' length to windward of The Helen, she came to anchor with her small bower anchor alone, and a chain cable an inch and a quarter thick. That a hurricane having arisen during the night, The Volcano broke her anchor and drifted athwart the hawse of The Helen, whereby the two vessels were brought into col-

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<sup>1</sup> [S. C. 3 Notes of Cases, 210.]

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lision, and The Helen was so severely damaged that she eventually sunk. That the collision was solely and entirely occasioned by the mismanagement and misconduct of The Volcano, &c.

The case was argued on behalf of the commander of the Volcano, by

*The Queen's Advocate and Phillimore, A. A.*

*Addams and Blake, contra.*

PER CURIAM.

DR. LUSHINGTON. It has been urged, gentlemen, in the argument at the bar, that this collision has already been inquired into by the Lords Commissioners of the Admiralty, and also by the admiral upon the station where the occurrence took place, and that the subsequent promotion of Lieutenant M'Illwaine clearly shows that in the opinion of competent judges no unseamanlike conduct is to be attributed to the commander of The Volcano. Gentlemen, it is my duty to inform you, that in this investigation we must be guided entirely by the facts disclosed in the evidence; and we must in no degree be influenced by any previous inquiry that may have been made, or the opinions which may have been formed by any individuals whatever. The cause comes before this court with the approbation of the Lords Commissioners of the Admiralty for a just and impartial decision, and it is obviously impossible \* that we can be in [ \* 339 ] any manner guided by the consideration of circumstances that may have occurred elsewhere; still more is it impossible for us to allow the promotion of Lieutenant M'Illwaine to have any influence upon our decision; that is a circumstance entirely out of his case, and dependent upon considerations with which we have nothing whatever to do. I will now, gentlemen, very shortly advert to one or two points in the case which relate to the conduct of The Helen, the vessel proceeding in the cause. It appears that when the steam-ship Volcano entered the bay, The Helen had already taken up her position, and was anchored by her best bower anchor; it also further appears that, conceiving her to be in a situation of safety, the greater part of the crew were below at the time, and one man alone is said to have been left upon deck. This circumstance was much commented upon in the argument, but in my view of it it can have no material bearing upon the question we are called upon to determine, because, assuming the fact to be so, it is abundantly clear that the collision which afterwards took place does not appear to have arisen from any thing which was done or left undone on the part of The

Helen. Another charge has also been made against the master and crew of The Helen with respect to their conduct in not going back to their vessel after the collision had occurred. In one of the affidavits brought in on behalf of Captain M'Ilwaine, this refusal on their part to return to their ship has been designated in strong terms as dastardly and cowardly conduct. Looking to the evidence which is before me, I confess that I am unable to accede to any such conclusion. It is stated by Captain M'Ilwaine himself, that at the period

when the collision took place the wind blew a perfect hurricane, [ \* 340 ] and that the sea was one mass of foam. If this be so, I cannot but think that it is perfectly natural and prudent on the part of the crew of The Helen that they should not, for the mere purpose, as I understand it, of saving their clothes, have attempted to regain their own vessel, which had suffered so severely under the circumstances stated. It is, moreover, to be observed, that even assuming they were disposed to make the attempt, there is no evidence to show that they possessed at their command any conveyance for so doing. Dismissing, therefore, from further consideration the objections which have been made with respect to the conduct of The Helen, let us now consider the conduct of the persons on board The Volcano; and the questions, gentlemen, which I shall ultimately refer to you with respect to this vessel, will be the following: 1st, whether, considering the state of the weather and the position which The Helen had previously taken up, The Volcano was brought to anchor in a proper place; and, secondly, whether at a subsequent period after the steam-ship was so anchored, proper precautions and fitting measures were adopted for the security of all parties. If you should be of opinion either that the anchorage was improperly taken up by The Volcano in the first instance, or that subsequently thereto another and a larger anchor ought to have been dropped, in either of these cases it will follow that the blame must be imputed to the officer and crew of The Volcano, and the damages must be pronounced for. If on the other hand you shall be of opinion that all ordinary and seamanlike precaution was observed, and that the accident arose merely from the violence of the squall which came on to blow, then the collision will be [ \* 341 ] clearly the result of inevitable accident, and the party proceeded against will be entitled to his dismissal.

Now, in proceeding to investigate these points in the case, I shall, gentlemen, content myself with bringing under your notice Captain M'Ilwaine's own statement, which he swears to be true; and I will not refer you to any of the opposing evidence, excepting those statements in the act on petition which are not, in any way, contradicted

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on the part of The Volcano. This mode of conducting the inquiry will, I apprehend, be in every respect less capable of exception on the part of Captain M'Ilwaine himself; and, whatever may be your opinion upon the evidence so brought to your notice, it will, I conceive, be impossible for Captain M'Ilwaine to say that the decision is not, at all events, founded upon an impartial consideration of the case.

The first document to which I must call your attention is a letter written by Captain M'Ilwaine, and dated from Carthagená the very day after the collision took place; in which letter Lieutenant M'Ilwaine, after stating that The Volcano, in consequence of stormy and tempestuous weather, was compelled to seek for shelter in Mahomet's Bay, describes the occurrence in the following words. He says:—"Observing several small vessels lying in the Bay of Mahomet, about ten miles to the N. N. E. of the Cape, I ran in and anchored in sixteen fathoms, and veered to sixty; the wind being off shore, we rode perfectly easy until midnight." In a subsequent statement, bearing date 12th June, 1838, he again says:—"That he anchored The Volcano about two cables' length on the starboard bow of a brig, several other vessels being at anchor in the bay." The question here arises, was this a right or a wrong position for The Volcano to take up, under the circumstances? It is expressly alleged, in the act on petition, \* on behalf of The Helen, that although [ \* 342 ] there were a few other small vessels at anchor in the bay, yet they were all of them anchored at a considerable distance from the brig, and that none were anchored so as to prevent The Volcano from anchoring elsewhere than to windward of The Helen.

As this averment in the act on petition is not denied in the answer, on behalf of Lieutenant M'Ilwaine, it must be taken as an admitted fact in the case, that there was a sufficient anchorage room in the bay for The Volcano to have selected a different anchorage, without putting other vessels in a state of jeopardy. The first question, then, for your decision, gentlemen, will be, whether or no the position taken up by The Volcano was a right position? There is, you will observe, some little difference between the statement of Captain M'Ilwaine and that of The Helen in the following particular, namely, that the owners of The Helen allege that The Volcano anchored directly to windward of The Helen; whilst the owners of The Volcano, without directly denying that she did so anchor to windward, state that she anchored on the starboard bow. From this it has been inferentially contended, by the counsel on behalf of The Volcano, that she could not have anchored directly to windward of The Helen. This inference is, I apprehend, substan-



tially a true one. At the same time I would call your attention, that the denial on the part of The Volcano is unaccompanied by any averment as to how many points she was so anchored on the starboard bow of The Helen. It must, then, gentlemen, be matter for your consideration what effect is to be attributed to this contradiction, on the part of The Helen. Looking to the manner in which the collision took place, and also to the statement as to the

[ \* 343 ] alleged \* alteration in the wind, it will be for you to determine, from the circumstances of the case, how many points on the starboard bow of The Helen it is probable that The Volcano was anchored; it will also be for you further to determine whether, considering the state of the wind and weather, she was not bound to have selected another and a different anchorage, when it was practicable for her to have done so. The weather, you will remember, had been tempestuous for several days preceding; and it is admitted by Captain M'Ilwaine that the wind was off the land, and blew strong in squalls, a circumstance which, in my view of it, must have induced the expectation that the squalls might by possibility increase, and should, at the same time, have also suggested the propriety of taking every precaution to prevent their evil consequences and effects. I now come, gentlemen, to the second point in the case for your consideration, namely, whether, in the mode of anchoring the steam-vessel, and at a subsequent period thereto, proper precaution was adopted for the common safety of the two vessels. The Volcano, it is admitted, was a vessel of 720 tons burden, and, according to the statement of Captain M'Ilwaine himself, it is represented that she was anchored by her small bower anchor, weighing only about 16 cwt. Now, laying out of consideration the affidavit of Mr. Courtney, as to what ought to be the weight of an anchor of a vessel of a certain tonnage, and equally laying out of consideration any opinion which may have been entertained by the Lords of the Admiralty, or other persons, upon the matter in question, you will decide for yourselves, gentlemen, whether, under the circumstances in which the vessel was placed, she ought to have anchored and remained at anchor with only an anchor of the weight [ \* 344 ] mentioned; in other \* words, whether it would not have been a more seamanlike and proper precaution to have dropped a second and a larger anchor. It appears, indeed, that at midnight, in consequence of the state of the weather, a consultation was actually held between the commander and the other officers of The Volcano upon this very subject, namely, the expediency of dropping a second anchor; but they were of opinion that there was no immediate necessity for their so doing. At the same time they state

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The Volcano. 2 W. Rob.

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that, in order to be prepared for any unforeseen contingency, a second anchor was prepared and got ready to be dropped; thereby in effect acknowledging the possibility of such contingency occurring. It was argued strongly, by her Majesty's Advocate, upon this point in the case, that, in so directing a second anchor to be got ready, the commander of *The Volcano* did all that was required of him at the moment; and that, under the circumstances, the laying out a second anchor would have been unnecessary, and if unnecessary, unseamanlike, the small bower anchor, notwithstanding the prevalence of the wind, having held them in safety during the entire day. How far there was an immediate necessity or otherwise for dropping the second anchor, is not the real question in this case; the question is, whether it would not have been a prudent and proper precaution to have done so. I do not mean that you are to strain the matter; but considering the facts of the case, with reference to the position of *The Helen*, the state of the wind, and all the circumstances, you will have to determine how far it was a measure which men acquainted with nautical affairs ought, in ordinary prudence, to have adopted. Upon the whole, then, gentlemen, I will thank you to assist me with your opinion, whether or no there was a want of due precaution, \* and a departure from proper sea- [ \* 345 ] manlike conduct, in the measures pursued and adopted by the commander of *The Volcano* upon the present occasion.

*The Trinity Masters*<sup>1</sup> were of opinion that *The Volcano* was to blame in the position she originally took up, and also in not letting out more cable, and in not letting go a second anchor.

Damage pronounced for.

In the course of the proceedings an affidavit was brought in, in exception to the testimony of one of the witnesses on behalf of *The Helen*, and the admission of this affidavit was opposed as being a novel attempt, and altogether unprecedented in proceedings by act on petition, &c. The court suspended the admission of the affidavit, stating, that if it should ultimately turn out that the merits of the case would be essentially affected by the evidence of the individual excepted to, it would be then time to determine the principle, how far such affidavits, in cases by act on petition, were admissible or not.

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<sup>1</sup> [Captain Weller and Captain Farrar.]

## THE PLYM.

August 7, 1844.

Application to the court to supersede an attachment, which had been directed to issue for non-payment of costs, in a cause of possession, upon the ground that, during a part of the proceedings in the original cause, the party applying had sued *in formâ pauperis*; 2dly, that the writ of attachment was wrongly directed, being addressed to the marshal of the Queen's Bench prison.

Application rejected.

*Semble*, when an attachment is issued by the court for non-payment of costs, the court has no power to supersede that attachment, saving upon grounds only relating to the manner in which the writ is executed.

THIS was originally a cause of possession, civil and maritime, promoted and brought on the 7th June, 1842, by John Frederick Barnikel, as sole owner and proprietor of the above-named vessel, against the said vessel, her tackle, apparel, and furniture, and also against William Wood, the mortgagee thereof, intervening for his interest therein. The party proceeding conducted his own cause up to the 14th of February, 1843, when, upon his prayer to that effect, he [ \* 346 ] was admitted to sue *in formâ pauperis*, and counsel \* and proctor were assigned to him. On the 24th of March the judge dismissed the suit, and condemned Mr. Barnikel in the costs. On the 5th of May, the bill of costs of Mr. Woods's proctor was taxed at 43*l.*; and a monition to pay the same was served on Mr. Barnikel, and returned into court on the 7th of June. On the 27th of June, 1843, an attachment issued in default of payment of the above bill of costs, and Mr. Barnikel was delivered into the custody of the keeper of the Queen's prison.

Mr. *Barnikel*, in person, moved to discharge this writ, contending, 1st. That he ought not to have been condemned in the costs of the suit; 2d. That the address in the warrant of committal was wrong. 5 & 6 Vict. c. 22.

Dr. *Addams*, *contra*.

## JUDGMENT.

DR. LUSHINGTON. This is an application to supersede an attachment, which issued some time since against the applicant for non-payment of certain costs, in which he has been condemned. It is necessary, in the first instance, to consider what authority this court

has to act in this matter, and also to be careful not to take into consideration any matters which may not properly be entered into. The 21st section of the 3 & 4 Vict. c. 65, provides : — “ That it shall be lawful for the judge of the High Court of Admiralty to order the discharge of any person who shall be in custody for contempt of the said court, for any cause other than for non-payment of money.” It follows, from this exception, that, in cases falling directly within it, I have no discretion whatever, but must govern myself by the strict rules of law prevailing antecedently to the \*pass- [\* 347 ] ing of this act. Upon what grounds, then, prior to the passing of this act, had the judge of the High Court of Admiralty jurisdiction to supersede an attachment issued in aid of a decree? I apprehend solely and only on grounds relating to the manner in which the writ is executed. This disposes of a large part of the objection which, in the first instance, has been addressed to the court by Mr. Barnikel. I am not at liberty to enter into the previous history of this cause, except for the purpose of taking a clear view of the circumstances which led to the attachment. The suit was commenced by Mr. Barnikel on the 7th of June, 1842; it was a cause of possession, which, from that time, went on in a very irregular manner; it was long delayed, indeed nothing was done from that time until the month of February, 1843. On the 14th of February, Mr. Barnikel prayed to be and was admitted to sue *in formâ pauperis*; and, having taken the usual and necessary oath, counsel and a proctor were assigned him. In March, 1843, the cause was heard, and the court made the following decree : — “ It dismissed the said William Wood (Stokes’s party) from all further observance of justice in this cause; dismissed the bail given on behalf of the said William Wood from the liabilities by them entered into, and from all further observance of justice in this cause, and condemned the said John Frederick Barnikel in the costs.” Now, I am of opinion that I have no power or authority whatever to review that judgment, pronounced so far back as March, 1843; and that, if that judgment be erroneous, the only remedy is by appeal to the Judicial Committee. But, in fact, no attempt is now made to impeach the decree. It is not alleged that Mr. Barnikel ought not to have been condemned in those costs, on the ground of his being a pauper at the time \*that decree was pronounced. I have no doubt, if that [\* 348 ] objection had been urged, that I could not have refused to condemn him in the costs incurred antecedently and up to the time when he was admitted to sue as a pauper. How otherwise could this court administer justice to the party improperly sued? A bill of costs was porrected by the proctor for Mr. Wood, and taxed by

the registrar at 43*l*.; and not a word has been said in objection to that bill. A monition was taken out, served, and returned, and I was placed under the necessity, it was my duty *ex debito justiciæ*, of ordering an attachment to issue. I conceive, therefore, that any objection arising out of Mr. Barnikel having been admitted to sue as a pauper, and that a part of this bill of costs extends over the time during which he was suing *in formâ pauperis*, to be an objection which it is not competent for me now to adjudicate upon. I may say, further, that if the question had been raised at the proper time, although I should have been strongly against giving such portion of the costs as was incurred after the 14th of February, I do not go the length of saying that it would not have been perfectly competent to this court to have extended the costs over the whole period of the cause. The second objection involves a question of much greater difficulty, namely, the objection to the indorsement upon the writ, which is in the following terms:—(Court here read the indorsement, and proceeded to observe,)—It has been argued by Dr. Addams, that in case the attachment should be illegal and void, by reason of the terms in which the attachment had been directed to the marshal of the Queen's Prison, that it would be competent to the court to amend the error, by issuing a fresh attachment against Mr. [ \* 349 ] Barnikel. That is a question which \* I am not prepared to enter into at the present moment; and, with regard to the objection itself, as it is one of considerable importance, involving the liberty of the subject, I must take further time before I decide upon it. I will transmit to the registrar the order which I shall be inclined to make.

The judge having subsequently considered the validity of the last objection, declined to supersede the attachment, or to order the release of Mr. Barnikel.

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### THE TWO FRIENDS.

November 5, 1844.

The crew of a stranded vessel having taken to their boats, in making for the nearest land fell in with another vessel also stranded and abandoned by the crew. Having boarded the vessel they succeeded in getting her off and bringing her safely to England. A claim to participate in the salvage set up by the owner of the vessel to which the salvors belonged, upon the ground that the salvors were enabled to reach the vessel saved solely by

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The Two Friends. 2 W. Rob.

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means of the boats and the use of his compass; 2dly, that some of the salvors were his apprentices.<sup>1</sup> 300*l.* awarded to the actual salvors. Claim of the owner rejected.

THIS was a cause of salvage, promoted by the owners and crew of The John Blake for services rendered to this vessel.

The circumstances of the case, which were somewhat peculiar, are fully noticed in the judgment of the court.

For the salvors, *Haggard* and *Elphinstone*.

For the owners, *Queen's Advocate* and *White*.

JUDGMENT.

DR. LUSHINGTON. This case is in some respects attended with peculiar circumstances, more especially in the following particular, namely, that the asserted salvors, with regard to their own vessel, had experienced a misfortune very similar to that which had befallen the vessel which is now proceeded against. I will now consider, in the first instance, what had occurred to the vessel, The Two Friends, antecedent to the time when the persons from The John Blake fell in with her. It appears that she was originally bound on a voyage from Newport to the island of St. Thomas, but her destination having been subsequently changed in consequence of [ \* 350 ] the state of the markets in that island, she was proceeding for the Havana, when, upon the 27th of February last, she struck upon a rock, off which she floated, but unfortunately again struck upon another rock in the neighborhood. Her crew, having remained by her until the 29th, left the vessel in two of her boats for the purpose of procuring assistance from the Havana, and they made accordingly for that place, where they arrived upon the 5th of March. Considering what occurred subsequently, I think it is not of very great importance to pursue an inquiry whether at the time they quitted The Two Friends the master and the crew of that vessel entertained any rational expectation of her eventual rescue from the dangerous position in which she was placed. It is perfectly clear that when they reached the Havana, they were unable, even with the assistance of the consignees, to induce any person to embark in the enterprise of going out to her assistance, and in consequence thereof the vessel did in point of fact become entirely and altogether abandoned. Let us now advert to the case of The John Blake. She was bound, it appears, on a voyage from Columbia to Cork, to call at Falmouth

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<sup>1</sup> [See The Columbine, 2 W. Rob. 186; Mason v. The Blaireau, 2 Cranch, 240.]



for orders. She sailed from Cape Antonio, in Cuba, on her homeward course, and upon the 6th of March last, when about thirty or forty miles from Cape Antonio, she got on to a reef of rocks, off which she subsequently floated, and again struck and became fixed. It is stated in the protest and affidavit of the master and crew, that after forty-eight hours exertion they were forced to abandon her; and it would seem that the abandonment actually took place upon the 9th

of March, when they left the vessel in the long-boat or jolly-  
[ \* 351 ] boat, having secured a sufficiency of provisions \* and some sails and a compass, and having further provided themselves with two coils of rope for the purpose of saving their lives. Whilst making for the island of Cuba, they fell in with The Two Friends in the then abandoned state to which I have already referred. Having boarded her, as they state, they found her with two anchors down. These anchors they weighed, and threw overboard part of the cargo of the vessel, and finally they got the vessel to sea, pursuing a course towards England, because they had no information as to the destination of the vessel; and from the inscription on the stern, they were led to suppose that she belonged to the island of Jersey. I may here observe, that in so doing, these persons adopted a wise and proper course under the circumstances in which they were placed. They set out further in their protest, in rather figurative terms, the reason of their determination to adopt this course. "They did it," they say, "for the benefit of the ship and cargo and of all persons interested in the same, and for the preservation of their own lives; and they did so after having with the deepest deliberation and concern considered what was the best course." From this statement it would appear that there were a variety of motives which induced them to adopt the plan they finally pursued, namely, the safety of the vessel and cargo, and the preservation of their own lives. It is, indeed, stated subsequently in the act on petition, and also in an affidavit, that they might have reached the island of Cuba in safety; be it so; the court must still recollect the undoubtedly dangerous spot they were in with their boats, and at a distance according to their own statement of

about thirty-five miles from the port which they were desir-  
[ \* 352 ] ous of reaching. The \* Two Friends having been thus got off, pursued her voyage to England, and arrived at Dartmouth upon the 20th of April, having encountered, as it is alleged, some bad weather in her voyage. The value of the property is 1,237l., from which sum of course a deduction must be made on account of a claim which is preferred by the Admiralty Proctor, in having in the first instance taken possession of her and procuring a valuation thereof. The question then remains, what amount of

remuneration is due to the persons who have thus brought the vessel home in safety? I am most clearly of opinion, that it is beyond all doubt a question of derelict; but at the same time that it is not a case of any very peculiar merit. The amount of reward to be allotted in case of derelict it is well known rests entirely in the discretion of the court.<sup>1</sup> In a very early case Lord Stowell said, "The amount of remuneration used to be a moiety, but that practice has long been departed from; and those who have sat in this chair have for a length of time determined that they will apportion the reward according to the merits of those who claim to be salvors, not exceeding a moiety of the proceeds, except, perhaps, in one or two particular cases." In the present instance it appears to me, that in determining what proportion of the property shall be allotted as salvage remuneration, I must first determine who are entitled in the character of salvors at all; and this of course involves the question whether the claim of the owner of *The John Blake* can be in any manner supported. What are the grounds upon which this claim is rested? Not upon the ground, most undoubtedly, that any actual assistance was rendered by his vessel, because she was lost and abandoned before the alleged salvors \*fell in with *The Two Friends*. [\* 353] It has, however, been contended, that he is entitled to participate upon two grounds; first, upon the ground that the assistance was rendered by his boats, sails, and compass; and secondly, because two or three of his apprentices were concerned in performing the service. Now really I do not, so far as my recollection serves me, remember any claim resting upon so slight a foundation as this. Why, the boats, in all probability, were themselves saved by the circumstance of meeting with the ship. What would have become of these boats if they had not met with the vessel? Either they might have been lost in attempting the passage to Cuba, or they would have been left at Cuba, and have been totally valueless and unserviceable to their owner. With respect to the two coils of rope and the compass, these, I must say, are matters far too minute to lay the foundation of a claim for salvage. Again, with respect to the apprentices, I at once decidedly pronounce against the claim of the owner upon any such ground. I consider the allotment of salvage to be a personal reward, bestowed for labor and skill, displayed in the performance of a certain service; and whether the alleged salvors be apprentices or not, no other person has a right to interfere in that

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<sup>1</sup> [As to the amount to be allowed in cases of derelict, see *The Aquila*, 1 C. Rob. 44, note.]

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The Serhassan. 2 W. Rob.

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property which belongs to them. Upon the whole view of the case, thinking this was a case as truly stated by the Queen's Advocate, in which mutual benefit was realized by the salvors as well as rendered to the vessel, I think I shall allot an ample amount, if I decree to them the sum of 300*l.*, together with the costs of the proceedings.

[ \* 354 ]

\* SERHASSAN — Pirates.<sup>1</sup>

February 4, 1845.

Bounties upon the capture of piratical prahns decreed in respect of their crews under the  
stat. 6 G. IV., c. 49.<sup>2</sup>

THE petition in this case set forth that her Majesty's ship of war Dido, under command of the Honorable Captain Keppel, being at the port of Singapore, a notice was addressed to Captain Keppel, informing him that an act of piracy had been committed on a vessel trading to Singapore, by pirates infesting the coast of Borneo and Tanjong Dattoo. That her Majesty's ship Dido thereupon sailed from Singapore, and having anchored off Tanjong Assi, on the north-west coast of Borneo, the pinnace and two cutters belonging to The Dido were despatched, under the command of Lieutenant Horton, then senior lieutenant of the ship, to reconnoitre for pirates, with orders to proceed first to the island of Mohrundun, thence to the Natunas Islands, about forty miles distant, and thence to Sarawack. That Mr. S. B., belonging to a trading establishment at Sarawack, was at his own suggestion, by reason of his being well acquainted with the Malay language, and his general local experience, taken as a passenger in the pinnace. That on the morning of the 10th of May, 1843, on the boats nearing an island called Serhassan, off the coast of Borneo, six large native prahns were observed rounding a point of land on the said island, and approaching the boats with loud cries, accompanied by the beating of gongs and other indications of hostility; whereupon Lieutenant Horton directed the boats to form and advance abreast towards the said prahns, and having approached sufficiently near, Mr. B. hailed the prahns in their native language,

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<sup>1</sup> [S. C. 3 Notes of Cases, 591.]

<sup>2</sup> [See The Illeanon Pirates, 6 Moore, (Pr. Council,) 471, on the same subject.]

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The *Serbassan*. 2 W. Rob.

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demanding their purpose, a flag of truce, namely, a blue ensign, being hoisted and pendant, and the gun being covered with a coat. That the prahns notwithstanding continued to \*approach, [ \* 355 ] and when within 150 yards commenced firing on the boats, whereupon a contest ensued and continued for a few minutes, when one of the large prahns (the crew whereof had fought with great bravery) struck her colors and called for quarter, which was immediately granted, and the prahn taken possession of. That the other five prahns made off for the shore with the two cutters in chase, between whom a constant fire was kept up until the prahns reached the shore, when they were instantly abandoned and taken possession of by the said cutters. That seven or eight dead bodies were found on board the prahn which had struck to the pinnacle, as also at least twenty-five others who were taken and secured. That the loss of life on board the five other prahns was not less than twenty-two men, forming an aggregate of at least fifty-five piratical persons either taken and secured or killed in action. That the crew of each of the large prahns consisted of not less than thirty men, and the crew of the smaller prahns of not less than ten men, making a total of not less than one hundred and twenty men who were alive and on board such piratical vessels at the beginning of the attack. That each of the large prahns was armed with three long brass swivels, muskets, spears, and knives, and the smaller prahns with small firearms, spears, and knives. That no proceedings were taken against the pirates who had been captured, and who were, after a time, released, after having expressed great contrition for their offence, inasmuch as it was deemed expedient by Mr. B. and Lieutenant Horton to spare their lives after the severe lesson they had received, in the hope that in the event of a shipwreck occurring off the coast, they would be less actuated by revenge to perpetrate the cruelties formerly \*prac- [ \* 356 ] tised by them, having assured them that should this ever again occur, the whole of the island would be destroyed by her Majesty's vessels.

Upon this statement of facts, *Addams* moved the court to pronounce that there were on board the said piratical prahns one hundred and twenty men at the commencement of the action, and that fifty-five were either killed or taken, and to decree the higher rate of bounty for the same under the provisions of the statute 6 Geo. IV. c. 49.

The motion was opposed by the *Queen's Advocate*, upon the ground that there was not sufficient evidence to establish the fact that the

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The Serhassan. 9 W. Rob.

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crews of the prahns were pirates, so as to entitle the crews of the cutters to the bounties under the act.

PER CURIAM.

The question which I have to determine is whether or not the attack which was made upon the British pinnace and the two other boats constituted an act of piracy on the part of these prahns, so as to bring the persons who were on board within the legal denomination of pirates.

The preamble of the act which has been referred to (6 Geo. IV. c. 49,) is in these words: (Court read the preamble of the act, and observed) — Now in my apprehension no form of words could more plainly express the intention of the legislature than the terms which are here adopted. The import of them is obviously to comprehend all acts of piracy by whomsoever committed, and to declare that it is not necessary, in order to found a claim to the bounties given by the statute, that the attack should be confined to persons carrying on piracy as a regular occupation.

[ \*357 ] \* The only question then is, was the attack made by the persons on board these prahns an act of piracy or not.

It appears that every effort was made on the part of Lieutenant Horton to prevent a conflict and unnecessary bloodshed. Signals were made, and other measures were adopted for this purpose. Yet these persons, regardless of the consequences, and for no reason that I can understand to justify their conduct, nevertheless persisted in attacking the British force. It has been suggested by the *Queen's Advocate* that the attack was probably unintentional, and that the parties who made it might not have been able to distinguish the British flag. It is utterly impossible that I can give any weight to such a suggestion. It matters not that they may possibly have entertained no inclination to bring themselves in conflict with the British power; it is sufficient, in my view of the question, to clothe their conduct with a piratical character if they were armed and prepared to commence a piratical attack upon any other persons.

That the attack was premeditated is clearly shown by the fact that an ambush was placed on shore to cut off the detachment, in case they should land. It can make no difference whether they were inhabitants of that or any other island; nor can it be imagined that the title of pirate attaches solely to persons following an avowed piratical occupation upon the high sea. In the seas where this transaction took place there is every species of distinction to be found. There are, for example, persons who carry on the sole business of pirates, and whose only occupation is piracy. There are others, again, who

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The Pauline. 2 W. Rob.

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resort to it only at fixed and particular periods ; whilst others are there found, who, availing themselves of contingent circumstances, \*show a piratical disregard of all rights only as [ \*358 ] opportunities favorable to the attempt may arise.

Upon the whole I see nothing to induce me to doubt the construction of the statute as fairly applying to the circumstances of this particular case, I must, therefore, consider that the act has made it my duty to pronounce that the bounty is due. In so doing, I wish it to be understood that my decision cannot be made a precedent for other cases of the kind where the circumstances may be different. Every one of these cases must depend upon its own merits, and upon the locality where the transaction takes place.

I am of opinion that the parties before the court are entitled to the bounties which they claim. It appears that there were one hundred and twenty pirates on board the vessels at the commencement of the conflict, and that forty-five were captured or destroyed. For these they are entitled to the higher rate of bounty.

Court awarded accordingly.

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### THE PAULINE.<sup>1</sup>

March 8, 1845.

A vessel which had stranded within low-water mark and which was taken possession of by the bailiff and the lord of the manor, not at low water, but when the tide was in to the extent of some feet, condemned as droits of admiralty. Claim of the lord of the manor to the proceeds of the sale thereof as *wreckum maris* overruled. *Semble*, the jurisdiction of the admiralty subsists at the time when the shore is covered with water ; the jurisdiction of the common law when the land is left dry.

In this case The Pauline, a French vessel, laden with a cargo of wines and tobacco, having run ashore upon the Pole Sand, at the mouth of the river Exe, upon the 27th of March, 1843, was abandoned by the crew, and upon the following day she was discovered and taken possession of by the water bailiff of the manor of Kenton, of which manor the Earl of Devon is lord.

\* The vessel and cargo having been subsequently sold as [ \*359 ] derelict under the warrant of the court, the proceeds were

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<sup>1</sup> [S. C. 3 Notes of Cases, 616.]



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The Pauline. 2 W. Rob.

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brought into the registry, and an appearance was given on behalf of Mr. Wilkinson, in whom it was alleged vested the legal ownership of the manor and royalty of Kenton, and who claimed the said proceeds as being the proceeds of property stranded upon the manor within low-water mark, and in a spot left high and dry at the receding of the tide, thereby constituting *wreckum maris*.

This claim was resisted by the Admiralty Proctor, who claimed the property on behalf of the crown, as droits of admiralty.

The cause was argued by

*Queen's Advocate* and *Phillimore*, on behalf of the crown.

*Addams* and *Bayford*, for the lord of the manor.

#### JUDGMENT.

DR. LUSHINGTON. The question in this case lies between the crown, as entitled to all droits of admiralty, and in substance the Earl of Devon, claiming as lord of the manor and royalty of Kenton, and asserted grantee of all wreck found thereon. The nature of the latter claim is not very specifically set forth in the proceedings in the cause, and it is unnecessary for the purpose of the discussion that I should more particularly inquire into it, because, by the consent of the party claimant, with the acquiescence of the law officers of the crown, the claim has been rested upon the same footing as an ordinary claim for wreck. The question then resolves itself into the simple question whether the property in this vessel be *wreckum maris* or a [ \* 360 ] droit of admiralty. If the former, the lord of \*the manor is clearly entitled; if the latter, the right of the crown as clearly attaches. With respect to priority of taking possession of the vessel, I am of opinion that no satisfactory conclusion can be drawn in favor of either party. It appears to me that the representatives of each party boarded her at one and the same moment; and, indeed, had it been otherwise, I do not conceive that this circumstance would have been of any importance in the consideration of the case, inasmuch that the question of right would, I apprehend, depend not upon priority of seizure, but upon the nature and description of the locality where the property was so taken possession of. What, then, are the facts of the case? The vessel, it is alleged, was taken possession of upon the 28th of March last, and the place in which she was lying at the time is stated on behalf of the lord of the manor to be within low-water mark. For the purpose of this suit, the counsel for the crown have been content to argue the case upon the assumption that the *locus in quo* was within low-water mark; I must, therefore, to a cer-

tain extent at least, assume the fact to be so. I may here notice, before I proceed to examine further into the facts of the case, that the *locus in quo* is not alleged to be within the body of the county. This, in my opinion, is an important circumstance in the case. It has been argued indeed that the lord of the manor has always exercised rights over the place, not only as to wreck, but also in taking payment for ballast. Assuming the fact to be so, I do not see that it can materially affect the question which I have to decide. If it had been alleged and proved that the *locus in quo* was within the body of the county, most assuredly that circumstance would have had the greatest weight. The mere fact, however, of taking \*payment [ \*361 ] for ballast, standing alone, cannot, I conceive, have any material bearing upon my decision, because it is obvious that such a claim may be founded upon the assumption that the sand when dry was within the county, as in the ordinary case of the sea-shore when so circumstanced.

Looking further into the facts of the case, it appears that the river Exe flows between the sand where the vessel was lying, and the actual land to the northward. The claim, however, is not derived from the possession of the manor on that part of the Exe, but of another manor, which extends from Powderham. Had the vessel gone ashore at Exmouth, the lord of the latter manor would, even if entitled to the bed of the river, clearly have had no claim. The claim, as I understand it, is strictly founded upon the assumption that the sand in question forms a part of the shore which in the map is designated as the "Warren," and which it is to be noticed is expressly stated in the chart to be covered with water, as is also the land approximating to the Pole Sands. Now, giving to the evidence of Lieutenant Corneck, who has made an affidavit in support of the claim of the lord of the manor, the utmost effect which I think can be fairly ascribed to it, I will assume that at certain times as stated by Lieutenant Corneck, this *locus in quo* is left dry and may be reached by persons on foot; the next consideration is, what was the actual situation of the vessel at the particular time when she was taken possession of by Lieutenant Corneck, acting on behalf of the lord of the manor. Upon this point there can, I think, be no doubt whatever. It is distinctly sworn by Lieutenant Corneck himself that the persons who boarded the vessel were in a boat, and that such boat was floated by the water. It is \*obvious, therefore, that she [ \*362 ] was not taken possession of at low water, but when the tide was in to the extent of some feet, whether more or less is of no material consequence. It is, I conceive, equally immaterial to the consideration of the case, whether the vessel was actually fixed in the

sand at the time, because it would, I conceive, be impossible to hold that in the place in which she was lying she could have been so completely and perfectly fixed as to enable any person to affirm with certainty that, if left to herself, she might not have been extricated by the influence of the wind and waves. Upon this state of facts I am now called upon to determine to whom in point of law the possession of the property legally belongs; and in forming my opinion it appears to me that my judgment must be guided by the consideration whether at the time and place in question the jurisdiction of the admiralty or that of the common law attached. Suppose, for instance, that, prior to the passing of the statute, a felony had been committed on board a vessel similarly situated with the vessel in this case, would the parties have been tried for the offence at the Admiralty Sessions, and by the judge of the admiralty as under the then existing state of the law, or would they have been amenable to the process of the common law? I am clearly of opinion that the jurisdiction of the admiralty would have prevailed, and for the following reason, namely, that the place was not within the body of the county, and was not dry, but covered with water at the time in question. The ancient law, as laid down in the earlier authorities, recognizes this distinction; and in *East's Pleas of the Crown*, I find the doctrine of law thus stated, namely, that the jurisdiction of the admiralty subsists [ \* 363 ] at the time when \*the shore is covered with water; the jurisdiction of the common law when the land is left dry.

The same doctrine has also been clearly and concisely stated in a valuable treatise lately published by Mr. Palmer upon *Wreck*; and in the practice of the court the doctrine has been carried out in the decisions of Sir John Nicholl, in the two cases<sup>1</sup> which have been cited in the course of the argument. In whatever way, then, I examine the facts of this case before me, either with reference to the earlier authorities, or to the judgment of Sir John Nicholl, I am led to the same conclusion as Sir John Nicholl in his decision in the case of the *Two Casks of Tallow*, namely, that it is my duty to pronounce against the claim which is set up on behalf of the lord of the manor in the present instance. The present claim, it is to be observed, in one respect differs from the case decided by Sir John Nicholl, namely, that the claim is not rested upon any admiralty rights especially conferred upon the lord of the manor, but is a mere territorial claim, that is, a claim for something annexed to the manor itself. It is also further to be observed, that it is a claim which directly involves the rights of the

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<sup>1</sup> [ *Rex v. Two Casks of Tallow*, 3 Hagg. Ad. R. 294; *Same v. Forty-nine Casks of Brandy*, 3 Hagg. Ad. R. 257. ]

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The Dowthorpe. 2 W. Rob.

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crown ; rights vested in the crown for the benefit of the country at large, and in some respects it may be said for the benefit of all who sail upon the sea. It is, therefore, especially the duty of the court, as it is of all courts where the rights of the crown are called in question, not to suffer the crown to be divested of any of those rights at the suit and demand of a subject, unless that demand is established by the most stringent and most satisfactory evidence.

Under the circumstances of the case, therefore, I pronounce against the claim which has been set up, \*of course decree- [ \*364 ] ing in favor of the manor for the casks which actually came on shore, according to the distinction to which I have adverted in my judgment.

*Addams* applied for the costs incurred by the lessee of the manor, but the court declined to give costs upon the ground that it had no authority to decree the expenses without the consent of the crown.<sup>1</sup>

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\*THE DOWTHORPE,<sup>2</sup> Lofty.

[ \*365 ]

March 8, 1845.

Claim of a ship broker to the remnant of freight remaining in the registry, in a cause of bottomry, dismissed with costs.

THIS was a question as to the disposal of a remnant of the freight earned by this vessel, and originally brought into the registry in a cause of bottomry. The general question was argued in March, 1843, and is reported *supra*, p. 73.

#### JUDGMENT.

DR. LUSHINGTON. On a former occasion I had to determine whether the freight arising from sixteen shares of this vessel, held by Mr. Lofty, had been legally assigned to Messrs. Birnie & Co. by a deed dated in May, 1842 ; and I was of opinion, that such deed was altogether inoperative for the purpose, because Mr. Lofty was no party

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<sup>1</sup> Since the decision on the case, an act has passed for consolidating and amending the laws relating to wreck and salvage. *Vide* Appendix.

<sup>2</sup> [S. C. 3 Notes of Cases, 623.]

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The Dowthorpe. 2 W. Rob.

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to it, and because Mr. Nicoll, by whom it was executed, had no authority to bind the interest of Mr. Lofty. It now appears that a small portion of this freight (all prior demands against it being satisfied) remains in the registry of the court, and this portion is claimed by the assignees of Mr. Lofty and by Mr. Nicoll, the claim of Mr. Nicoll, being rested upon a certain deed or document which purports to have been dated in February, 1841. I must here observe, that when the former question was debated no reference whatever was made to this document, and I cannot but express my surprise that it should now be introduced for the first time to the consideration of the court, because it is obvious that if Mr. Nicoll had, by virtue of this document, become entitled to the freight in question, the production of the deed would most essentially have supported the claim of Messrs. Birnie, who deduced their title from Mr. Nicoll himself.

[ \* 366 ] \* Assuming, then, for the purpose of the present discussion, that the document is a true copy of the deed executed between Mr. Lofty and Mr. Nicoll, and that such copy is legally admissible in evidence on account of the loss of the original deed, the question which I have to determine is confined to a mere question of construction; for the solution of which I must proceed to examine the document itself, and to state such of its contents as are in any way important. The paper, upon the face of it, purports, in the first place, to be an agreement entered into on the 26th of February, 1841, between T. Humphry, on the one part, and Mr. Lofty on the second part, and Mr. Nicoll of the third part; whereby Mr. Lofty agrees to hold sixteen sixty-fourth shares of the ship, and binds himself not to sell them or any part thereof without giving Mr. Humphry the preoption of purchase; Mr. Humphry and Mr. Lofty further guaranteeing to Mr. Nicoll the sole control and management of the ship, so far as their shares are concerned, and so long as they continue to be holders of such shares. Now what is the effect of the agreement as it is thus far expressed? It is, I apprehend, to confer upon Mr. Nicoll authority as broker and as broker only, and unless there be something more in the deed, it would be impossible to hold that it conveyed to Mr. Nicoll the power of dealing with the freight. What follows? The next stipulation is, that Mr. Nicoll is to receive a commission for the management of the ship, namely, two-and-a-half per cent. upon all freight and passage-money, and one per cent. upon all receipts and payments and upon all insurances to be made and effected by him; Mr. H. and Mr. L. agreeing to supply their proportion of whatever moneys may be required from time to time

[ \* 367 ] by the said J. N. for repairs \* and other expenses of the ship.

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The Dowthorpe. 2 W. Rob.

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This clause is, I conceive, an important clause, and deserving of much consideration; and for this reason, namely, that it shows that the owners were to find the necessary funds for the expenses of the ship, and at the same time it effectually excludes any intention on their parts that any portion of these expenses were to be advanced by Mr. Nicoll, or that he was to hold the freight as an indemnity for such advances. It is next stipulated that all "freight and passage-money received, and all sums expended on account of the ship, shall be carried to one general account, and the profits and losses shall be divided amongst the shareholders, in proportion to their respective shares in the vessel." The expression "received," it is to be noticed, is general, and is clearly applicable to all freight by whomsoever received; it is, moreover, as I conceive, expressly used for the purpose of settling the rights and liabilities of the owners of the ship in proportion to the shares they hold in the vessel, and was never intended to confer upon any particular person a new right to receive the freight, much less to give to Mr. Nicoll individually any control over such freight beyond that which the law gave him. I have now gone through the whole of the agreement, so far as it is important to the elucidation of the present question; and I am really at a loss to conceive upon which part of the agreement the claim of Mr. Nicoll can be supported. I have carefully examined my former judgment, in order to see if there was any thing in that judgment which could in any way militate against the opinion I am now about to pronounce. The result of this examination confirms me in the opinion, that upon this instrument, as upon the other, there is no legal foundation for the claim of Mr. Nicoll to take this freight \*out of the power of the assignees. It is, therefore, [ \* 368 ] my duty to pronounce against the claim, and, looking at the small amount of the property which has been made the subject of this litigation, I must pronounce against that claim with costs.



THE OCEAN,<sup>1</sup> Mastelow.

April 17, 1845.

Construction of the stat. 3 and 4 Vict. c. 69.

In order to establish that the necessities supplied to a foreign ship or vessel are necessities within the meaning of the act, the vessel must be in a state of exigency at the time ; and the articles supplied must consist of articles needful for the relief of such exigency. Articles supplied for the equipment of a vessel building in a foreign dock-yard not necessities within the meaning of the statute.

THIS was a suit promoted under the act of parliament 3 & 4 Vict. c. 69, for necessities alleged to have been supplied to this vessel whilst building at Jacobstadt, in the kingdom of Finland.

The act on petition stated, that the several necessities, amounting to 411*l.* 9*s.* 3*d.*, were personally selected and ordered by J. F. Bergengstrom for the equipment of The Ocean, then building at Jacobstadt, in the kingdom of Finland, and whereof the said J. F. B. and C. S. L., of Jacobstadt, were the owners. That upon the 4th of May, 1840, the said necessities were shipped on board a vessel under the command of the said J. F. B.; and, having been carried to Jacobstadt, were fitted and supplied to the said new vessel, and were absolutely necessary and suitable for her equipment. That the said vessel upon being launched was placed under the command of the said J. F. B., and that she has never since been in any port of Great Britain until quite recently, when she was compelled to put into Plymouth through stress of weather. That the articles or necessities so supplied are still on board the said vessel, and form a part of her tackle and apparel, and have been duly identified ; and that repeated application has been made to the said J. F. B. and C. S. L. for the payment of the same, but without effect.

[ \* 369 ] \* In answer to this act on petition it was pleaded, that in the month of May, 1843, the said ship sailed from Wyborg in Finland, laden with timber and deals, and bound for Cette in France. That whilst said ship was lying in that port, the said C. S. L. having become insolvent and a bankrupt, the said ship was sold at public auction by order of the assignees for the benefit of the creditors ; and was purchased *bonâ fide* by P. M. of Jacobstadt, a subject of the Emperor of Russia, who is still the true, lawful, and sole owner

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<sup>1</sup> [S. C. 3 Notes of Cases, 31.]

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The Ocean. 2 W. Rob.

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and proprietor of the said ship. That the necessaries in question were furnished before the ship was built or afloat, and upon the personal credit of the said J. F. B.; and that the demand for payment of the same can only be enforced like any common debt, and can form no lien upon the ship. That the plaintiffs in the suit had been guilty of great laches in not enforcing their demand by legal proceedings against the said J. F. B. and C. S. L. Wherefore, &c.

It was further pleaded in a reply, that the articles in question were not furnished upon personal credit at all; but supplied in the full belief and assurance that under the act 3 & 4 Vict. for extending the jurisdiction of the Court of Admiralty, the plaintiffs had a lien upon such ship for the said articles.

The case was argued by

*Addams*, for the material men.

*R. Phillimore*, *contra*.

#### JUDGMENT.

DR. LUSHINGTON. It is perfectly clear that, prior to the act of parliament 3 & 4 Vict. c. 69, this court possessed no jurisdiction over the subject-matter of the present suit. \* Before that [ \*370 ] statute was passed, the articles which are alleged to have been furnished to this vessel, would not have formed a lien upon the ship itself, and in order to recover the payment of these articles the remedy must have been sought in a court of common law, and the action must have been brought against the owners, provided they were residing in this country.<sup>1</sup> For the purpose of obviating certain inconveniences which were found to result under the ancient law, the statute in question was enacted; and in order to ascertain its true bearing upon the question before me, it is important that I should now more immediately consider the words of the 6th section. The 6th section provides, "that the High Court of Admiralty shall have jurisdiction to determine all claims and demands whatsoever, in the nature of salvage for services rendered, or damage received, by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel; and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or upon the high sea at the time when the services

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<sup>1</sup> [Otherwise in America in case of foreign ships. *The Jerusalem*, 2 Gall. 345 and *Notes* to second edition; *The Nestor*, 1 Sumner, 73; *The Gen. Smith*, 4 Wheat. 438; *Peyroux v. Howard*, 7 Pet. 341.]

were rendered, or the damage received, or the necessaries furnished, in respect of which such claim is made.”

From these words it would seem, that the former portion of this section is intended to refer generally to all ships or sea-going vessels, whilst the latter is to receive a more limited construction, and is to be confined exclusively to foreign vessels. The intention of the legislature in thus framing the section is, I conceive, obvious upon the face of it. Before the statute was passed, all claims for salvage, and all questions of damage, as also all demands for towage services, when the transaction took place within the body \* of a county, were cognizable in the courts of common law alone; if this court had proceeded to adjudicate in the matter, it would have been subjected to a prohibition. For the convenience of parties who might so render services, or receive a damage, it was deemed expedient to restore the ancient jurisdiction of the Court of Admiralty, and in so doing to give the option of proceeding by the more summary process of this court instead of compelling an action at law. So much for the earlier portion of the 6th section. It remains that I should now consider the clause with respect to “necessaries supplied to any foreign ship or sea-going vessel.” These, I have already stated, are confined exclusively to foreign vessels; and the intention of the legislature in making the provision was, to remedy great inconveniences which had formerly occurred in cases of foreign vessels driven by stress of weather upon the coasts of this country. In such cases, it often happened that the master had no credit, and great difficulties were experienced in providing the requisite repairs, and in obtaining a supply of necessaries for the further prosecution of the voyage.

With a view of encouraging the advancement of these supplies, and thereby facilitating the progress of vessels so situated to their ports of destination, the jurisdiction of this court was enlarged by the 6th section of the act under consideration. But to what extent? In my view of it, only to the extent of embracing the cases of necessity to which I have adverted. I cannot for a moment conceive it was ever the intention of the legislature to confer upon this court the species of jurisdiction which is attributed to this statute by the parties who are promoting this suit, namely, that if any articles whatsoever, which may be requisite and necessary for the fitting out a [ \*372 ] vessel, are furnished \* to a foreign ship,—that ship being at the time in any part of the world, or, as in the present case, even building in a foreign dockyard,—this court may enforce a lien upon that vessel at the suit of a British merchant or manufacturer, who may have supplied such articles, and the vessel may be pro-

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The Princess Royal. 2 W. Rob.

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ceeded against by the process of this court, if at any time after she should come within the admiralty jurisdiction. Such a construction of the statute would, I conceive, be in direct defiance not only of the ancient law of this country, but of the general maritime law of Europe. It would, moreover, entail upon the court, in the exercise of this branch of its jurisdiction, the greatest inconveniences. For example, it would, in the first place, be incumbent upon the court in all cases of this kind, to determine, as matter of fact, whether the articles asserted to have been furnished were actually supplied or not; it would also have further to investigate and ascertain, what would at all times be matter of great difficulty, whether new and supervening claims upon the ship had not been acquired in the nature of salvage or bottomry, or by transfer of the vessel from one owner to another. These inconveniences, if I entertained any doubt in my own mind as to the true construction of this statute, would preponderate strongly in influencing my decision against the claim which is set up by the promoters of the present suit. But I do not entertain any doubt in deciding, that in order to bring a claim of this kind within the legal construction of the act of parliament, the vessel must be in a state of existing exigency; and the necessaries supplied must consist of articles which are requisite at the time and in the condition in which that vessel is placed. These points have not been established by the promoters of this suit in the present \*instance; and [ \*373 ] consequently the claim which they set up cannot be supported. The owner of this vessel, therefore, must be dismissed, and, as he is a foreigner, it is my duty to decree him the costs of these proceedings.

Claim dismissed with costs.

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THE PRINCESS ROYAL,<sup>1</sup> Light.

May 6, 1845.

Construction of the stat. 7 & 8 Vict. c. 112, s. 16.

Masters of vessels are only entitled to sue in the Court of Admiralty for their wages under the statute, when the owner has become insolvent in the strict legal sense of the term, namely, by taking or applying for the benefit of the Insolvent Debtors Act.

THIS was a question as to the admission of a libel, in a suit for

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<sup>1</sup> [S. C. 4 Notes of Cases, 70.]

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The Princess Royal. 2 W. Rob.

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subtraction of wages, promoted by the late master of this vessel, under the statute 7 & 8 Vict. c. 112, s. 16.<sup>1</sup>

The libel consisted of four articles; and the third article [ \* 374 ] pleaded: — “ That the said C. F. is insolvent, \* and unable to discharge the lawful debts due and owing from him, and hath so declared and admitted to divers persons; and this is,” &c.

*Harding*, in objection to the libel, contended — That the averment in the third article was insufficient to bring the master’s claim within the provisions of the statute; that the mere inability of a ship-owner to discharge the lawful debts owing from him was not the insolvency contemplated by the act; that the term insolvent was restricted to a legal and more limited meaning, namely, an insolvent who had taken or applied for the benefit conferred by the act for the relief of insolvent debtors; that this construction of the term was supported by the decision of the Vice-Chancellor, *In re The Birmingham Benefit Society*, reported in 3 Symons; and that the decision in that case was directly applicable to the present question.

. *Haggard, contra*. That the insolvency of the owner was sufficiently pleaded to give the master a *persona standi* in the suit; that the sixteenth section of the statute was remedial in its objects, purporting to relieve the masters of vessels from certain disadvantages and disabilities under which they formerly labored, and must be construed accordingly; that, by limiting the term to the strict legal meaning of insolvency, under the Insolvent Debtors Act, the masters would, in a great measure, be deprived of the benefit which the legis-

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<sup>1</sup> The sixteenth section provides — “ That all the rights, liens, privileges and remedies, (save such remedies as are against a master himself,) which by this act, or by any law, statute, custom, or usage, belong to any seaman or mariner, not being a master mariner, in respect to the recovery of his wages, shall, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships or master mariners, in respect to the recovery of wages due to them from the owner of any ship belonging to any of her Majesty’s subjects; and no suit or proceeding for the recovery of wages shall, unless they exceed 20*l.*, be instituted against the ship, or the master or owner thereof, either in any Court of Admiralty, or Vice-Admiralty Court, or any court of record, in her Majesty’s dominions, or the territories under the government of the East India Company, unless the owners of the ship shall be bankrupt or insolvent, or the ship shall be under arrest, or sold by the authority of any Admiralty or Vice-Admiralty Courts, or unless any magistrate, acting under the authority of this act, shall refer the case to be adjudged by any such court or courts, or unless neither the owner nor master shall be or reside at or near the port or place where the service shall have terminated, or where any seaman shall have been discharged or put on shore.”

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The Princess Royal. 2 W. Rob.

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lature intended to confer upon them, and there was nothing in the words of the act itself to compel the court to any such conclusion; that the term "insolvent" stood out in the act, wholly unaccompanied by any words of restriction or \* limitation; [ \* 375 ] and may, therefore, fairly be received by the court in its general and more extended acceptation.

#### JUDGMENT.

DR. LUSHINGTON. The question in this case arises upon the construction of the act of parliament 7 & 8 Vict. c. 112; a statute which has introduced a very important change in the law, as regards the right of masters of vessels to sue for their wages in this court.

The third article of the libel pleads that the owner of the vessel is insolvent, and is unable to discharge the debts due and owing by him; and it has been contended that the averment so pleaded is sufficient to confer upon the master a *persona standi* in this suit, under the provision of the sixteenth section of the act. I may here observe, that if the construction which is contended for is to be received in the present instance, it will entail upon the court great inconvenience and difficulty, in all future cases which may come before it under the act in question; because I shall have to determine, in this and all similar cases, not only whether the owner be unable to discharge his debts, but whether such, his inability, falls within the general acceptation of the term insolvency, as distinguished from the more limited meaning which it has received under the Insolvent Debtors Act. If the act of parliament compels me to sustain the construction, it will undoubtedly be the duty of the court not to decline the *onus* which is cast upon it, from any consideration of these difficulties and inconveniences; at the same time it furnishes, I think, a strong argument, *à priori*, against the construction in question, that it would involve investigations of this kind, in which it would be extremely difficult for the court, \* with the powers [ \* 376 ] it possesses, to arrive at a perfectly true and satisfactory conclusion.

Now, looking to the words of the sixteenth section, I find the term "insolvency of the owner of the ship" is repeated more than once. I find, moreover, that each time it is employed it is used in immediate connection with the word "bankruptcy." In the latter part of the section the words are: — "Unless the owner of the ship shall be a bankrupt or insolvent, or the ship shall be under arrest," &c. From the repetition of these words, in such immediate connection with each other, I am of opinion that, in construing the intention of the



act, the words "bankruptcy" and "insolvency" must be taken together. If this be so, it follows, I conceive, that the word "insolvency," as used in this statute, falls within the interpretation put by the Vice-Chancellor, in the case of the Birmingham Benefit Society, referred to by Dr. Harding in his argument. In that case, as reported in 3 Symons's Reports, the petition prayed that the trustees of a person, who had been treasurer of the society, and had subsequently assigned all his estate and effects for the benefit of his creditors, might be ordered to pay out of the estate a sum of 130*l.* to the petitioners, as "stewards of the charity," in preference to the other creditors. The question entirely turned upon the meaning of the words "bankrupt or insolvent," in the tenth section of the statute 33 G. III. c. 54; and on behalf of the defendants it was argued, that as the word "insolvent" was coupled with the word "bankrupt," the act meant a person who had taken the benefit of an act for the relief of insolvent debtors.

The Vice-Chancellor upheld this construction, and dis-  
[ \* 377 ] missed the petition, upon the ground that the term \* "insolvent," in the act, was not a person who had made a mere assignment for the benefit of his creditors, but a person who had taken the benefit of an insolvent debtors act.

Considering that the decision of the Vice-Chancellor, in the case above-mentioned, has a direct bearing upon the question before me in this case, I feel no difficulty in concluding that the true meaning and effect of the section in question, in the present instance, is not to give to this court a general jurisdiction in all cases where the owner is unable to discharge his pecuniary obligations; but that masters of vessels shall be entitled to resort to this court for their wages, only when the owner has become insolvent within the strict legal acceptance of the term. In thus limiting the definition of the term "insolvent," as used in this statute, I conceive that I am fairly carrying into effect the meaning of the legislature, so far as it was intended to confer a benefit upon the master. I must, therefore, reject the libel; and, as the question is a question *primæ impressionis*, I can give no costs.

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The Iron Duke. 2 W. Rob.

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THE IRON DUKE,<sup>1</sup> Williams.

May 13, 1845.

A steam vessel, proceeding at the rate of between eleven and twelve knots an hour, in a track where many vessels were passing up and down, condemned in the damage.<sup>2</sup>  
Masters of merchant vessels not compelled to carry lights.

In this case *The Parama*, a vessel of 200 tons, and laden with a valuable cargo, whilst on a voyage from Liverpool to Montreal, was run down off the Welsh coast by *The Iron Duke*, a steam vessel belonging to the Dublin Steam Packet Company, and almost immediately went down, her master and five of the crew being drowned.

\* The action was by plea and proof; and, on behalf of the [ \* 378 ] owners of *The Parama*, it was submitted by

*Queen's Advocate* and *Haggard* — That the collision was solely attributable to the misconduct of the master and crew of the steamer, in not keeping a good look-out, and by proceeding at an improper speed; that they were proceeding at the rate of between eleven and twelve knots an hour, in a track much frequented by vessels, whilst, by their own admission, the night was so dark that they could not descry *The Parama* until they were close upon her; that it was proved by the mate of *The Parama* that the steamer was perceived when she was more than a mile distant, and a powerful light was exhibited from *The Parama*, which must have been discernible by the persons on board the steamer, if a good look-out had been kept; that the master, mate, and third mate were in bed at the time, and the steamer was left in charge of the second mate only, with only one man in the fore-castle on the look-out.

*Addams* and *Nicholl, contra*. That, from the greater size of the steamer, and the fact that she had three strong lights, one at her foremast head and one at each bow, the steamer might possibly be discerned at a greater distance than *The Parama* could be seen from the steamer; that the light exhibited from *The Parama* was only exhibited at the last moment, just previous to the collision, and was

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<sup>1</sup> [S. C. 4 Notes of Cases, 94.]

<sup>2</sup> [ *The Rose*, 2 W. Rob. 2; *The Europa*, 2 Law & Eq. R. 557.]

wholly insufficient for the purpose of giving warning to the steamer; that, under the circumstances of the case, The Parama was bound to have carried a sufficient light, properly fixed and displayed; and the fact of her not having done so put the brig's case out of [ \* 379 ] court, and if the \* steamer was to blame at all, the damage must be equally shared between the two vessels. Lastly, that there were great discrepancies in the evidence of the witnesses on the part of The Parama, with respect to the actual collision in question; and, as far as the balance of credibility was to influence the decision, the balance was clearly in favor of the statement set up by the steamer.

#### JUDGMENT.

DR. LUSHINGTON. Gentlemen,— It was properly observed by one of the learned counsel, that all questions of this description embrace four considerations: first, whether the blame of the collision is solely imputable to the vessel proceeded against; secondly, whether it is imputable to the vessel proceeding in the cause; thirdly, whether both vessels are equally in default; and, lastly, whether the collision be the result and consequence of inevitable accident. These four questions we have to consider and to determine in the present instance; and in order to elucidate these points, I must, in the first place, request your attention to some of the facts in the case which it appears to me admit of no reasonable doubt or controversy. The collision, you will observe, is stated to have occurred at the entrance of the Pilot Ground of the port of Liverpool, the Port Lynas Light being at the time distant about ten miles, and bearing W. and by N.

The locality being thus defined, it will be for you to judge what (if I may use the expression) were the incidents of that locality in regard to the probability of a number of vessels sailing in that track in one direction and another. It is further stated, that the wind was W. N. W. or thereabouts; that the course of the Parama was to the south-westward, on the starboard tack, close hauled, [ \* 380 ] \*and that the steamer was proceeding with the wind abeam, in a direction somewhat south-east and by east. These, gentlemen, may be taken as admitted facts in the case; other points have arisen in the course of the discussion respecting which it would, I think, be impossible to come to any satisfactory conclusion, if we were bound to examine them with minuteness, and to decide them with absolute precision. With respect, for instance, to the precise period of time at which one vessel was seen from the other, and what was the precise period when a light was hoisted (if

any light was hoisted at all). These, I apprehend, are points which it would be impossible to ascertain with any precision and exactness, as well from the complexion of the case itself as also from the nature of human testimony under the circumstances. The same observations, I conceive, would also apply to the question of distance. It is, perhaps, more or less easy to judge of distances at sea according to the character of the night, the object to which the sight is directed, and more especially according to the skill and practised eye of the individuals engaged in the look-out. When, however, as in the present instance, the evidence of witnesses upon these points has to be considered in a court of law, it will almost inevitably happen that there will be the greatest possible discrepancy in their testimony, without any corrupt intention being fairly imputable to the witnesses themselves. The same observation may, I think, be extended to another point in the case which has been put in issue in the pleadings, and which is much overloaded with evidence in the proofs, — I mean the degree of darkness which prevailed at the time. In the evidence which is before you upon this point, you will perceive, that, whilst some of the witnesses describe \*the night as being [ \* 381 ] intensely dark, others affirm with confidence that they could see without difficulty to a very considerable distance from the ship. For my own part, looking to the balance of the evidence, I feel no difficulty in concluding with satisfaction to my own mind, that the night must be considered to have been a dark night, though not of intense darkness, and certainly not a hazy or foggy night, as deposed to by a great number of witnesses. In the course of the argument, it was urged by the learned counsel for The Iron Duke, that the testimony of the witnesses for the Parama is in some measure disparaged by certain discrepancies which are to be found in their evidence respecting the details of circumstances which attended the collision in question. I am bound to tell you, gentlemen, that in my view of them these discrepancies do not materially affect the case, and ought not to affect our decision, — and for this reason, namely, that in all accidents of this kind very great confusion must inevitably prevail on board the vessels in collision; and it would be unreasonable to expect that the minor incidents and circumstances should be noted with any very particular accuracy or minuteness. Let us now proceed to consider what was the state and condition, and what were the measures adopted by the master and crew of The Parama, whose owners are seeking in this cause to recover an indemnification for their loss — a loss involving the very considerable sum of 18,000*l*. It is to be remembered, in the first place, that The Parama was on the starboard tack, close hauled. Being so situated, upon descrying the steamer, she

was bound to keep her course; and it has not been suggested even in argument, that she ought or could have done any thing [ \* 382 ] except hoisting a \* light. The question then arises, did she or did she not in fact hoist a light? and if she omitted to do so, does such omission amount to a culpable neglect of any obligation imposed upon her by the ordinary rules of navigation?

In a former case which came under my consideration, and in which I was assisted by two of the gentlemen of the Trinity Board, — I mean the case of *The Rose*,<sup>1</sup> — the same proposition was mooted; and in delivering the judgment of the court, I expressed myself in these words. — “It has also been contended that *The Regina* was in fault in not carrying a light. With respect to the latter point I must observe, that it has been discussed over and over again in former cases of this kind, and I believe there is no occasion in which it has been laid down as a general principle that merchant vessels ought constantly to carry lights. Under certain circumstances, undoubtedly, it may be right and expedient to do so; and whether *The Regina* was bound to have carried a light or not under the circumstances of this particular case, is a point which you will take into your consideration.”

Gentlemen, the course which I adopted in the case of *The Rose*, I intend to pursue in the present instance; and without entering into any nice disquisition, whether merchant vessels ought generally or constantly to carry lights, I shall request your opinion, whether, under the peculiar circumstances of this case, you consider that it was the duty of the persons on board *The Parama* to have carried lights. This question you will consider with reference to your own nautical experience, and also with reference to the place in which *The Parama* was sailing, remembering that if it was the duty of The [ \* 383 ] *Parama* to have \* carried and hoisted a light, it must have been equally incumbent upon every other vessel sailing in the same track to have adopted a similar precaution.

There is one circumstance connected with this part of the case, to which I particularly invite your attention, namely, that it is distinctly in evidence that a light to a certain extent was on board *The Parama*, in the cabin of that vessel. This is not denied on the part of *The Iron Duke*; but it is contended on her behalf, that the light in question was not sufficient for the purpose, and that it was incumbent upon the master not only to have had a sufficient light on board, but that he ought to have been prepared with such light, and to have

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<sup>1</sup> Reported *supra*, vol. ii. pt. 1, p. 4.

exhibited it in the first instance upon descrying the approach of the steamer. As I have already stated, gentlemen, I leave it entirely to you to determine whether this ought to have been done or not, — whether it was done or not it is my duty to consider; and, in concluding my observations upon this part of the case, to point out to you the particular evidence that bears upon it. On the part of The Parama, you will observe, it is distinctly averred that the light in question was a globular light, standing high enough from the deck to have thrown a strong reflection on the sails, and to have been visible at a considerable distance. It is also directly sworn in the depositions of some of the witnesses, that for a considerable period before this collision ensued, the binnacle light was held over the side of The Parama; and that, finding the steamer was approaching with great rapidity, the mate began to shout, and then called to the man at the wheel to put the helm hard up. This is the statement of Hickell, the mate of The Parama; and in reading his evidence, I can see nothing \* which is in the slightest degree contrary to proba- [ \* 384 ] bility or inconsistent with the appearance of truth. He is, moreover, supported in this statement by the evidence of Cover, his fellow-witness, who, although he differs with Martin with respect to who was at the helm at the time, in no respect contradicts the averment as to the hoisting of the light.

Another question here arises, was this light hoisted or not hoisted in due time? The three witnesses to whom I have just referred all swear that it was. The question is put to them upon interrogatory, and they are asked whether the hoisting the light and the order to port the helm were distinct or contemporaneous operations. To this question it is answered by one and all, that the order and the act were not contemporaneous, but that a considerable interval, about five minutes, intervened between the hoisting the light and the order to put the helm hard up. If this be so, it is an important feature in the case for The Parama; because it is alleged on the part of the steamer, that she was not descried until the last moment, and that the order to put the helm up was only given when the collision was upon the point of taking place.

Having thus far disposed of the case of the vessel which has been run down, I must now address a few observations to you with respect to the conduct of the steamer. The steamer, you will perceive, admits that she was going at full speed, about 11 or 12 knots an hour; that she had one man on the look-out and no more; and that the night, though not hazy, was so dark that she never saw The Parama until that vessel was actually upon her. Can it be said that in going at such speed, upon such a night, the master of the steamer was



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The Iron Duke. 2 W. Rob.

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[ \* 385 ] justified in his conduct according to those \*rules of navigation which have been heretofore received and laid down in this court? I apprehend not; and I will here repeat in conclusion of my remarks, what I laid down in the case of *The Rose*, — “that although it may be a matter of convenience that steam-vessels should proceed with great rapidity, the law will not justify them in proceeding with such rapidity if the property and lives of other persons are thereby endangered.”

Gentlemen, you will now have to consider the several points to which I have called your attention, and I shall be glad to receive from you a distinct opinion whether you think *The Parama* was to blame in any part of her conduct, or whether *The Iron Duke* was to blame.

*Trinity Masters.* We think that *The Parama* did nothing wrong; our opinion is, that she did show a light, although it was but a very short time before the collision. We further think that, under ordinary circumstances, sailing vessels do not show a light, and are not required to do so. There is a rule, that if a vessel wants a pilot she shows a light, and the pilot should also show a light; but this rule does not apply to sailing vessels. With respect to the conduct of the steamer, we are of opinion that, considering the admitted darkness of the night, and that many vessels were boarded during the night by pilots in the neighborhood of the place where the collision took place, *The Iron Duke* was not navigated with that degree of caution which was requisite on such a night and in such a neighborhood.

The master, chief mate, and third mate, were all in bed, [ \* 386 ] which proves an indifference to their responsibility \* perfectly unjustifiable under the circumstances of the case.

Damage pronounced for.<sup>1</sup>

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<sup>1</sup> This decision was appealed to the Judicial Committee of the Privy Council, and the sentence of the court was affirmed. [4 Notes of Cases, 585.]

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The George. 2 W. Rob.

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THE GEORGE,<sup>1</sup> Roberts.

June 12, 1845.

The time and place in which a vessel should be brought up is entirely within the province of the pilot, and the master must be governed upon these points by the pilot's direction.<sup>2</sup> Owners of a vessel running down another vessel at anchor in the Bristol Channel dismissed, but without costs.

THIS was a cause of damage promoted by the owners of the late schooner *Nora Creina* and of the cargo laden on board. The actions were entered in the sum of 6,500*l*.

The act on petition set forth, that The *Nora Creina*, of the burden of 163 tons, arrived in King's Road, in the Bristol Channel, on the 11th of November, 1844, bound to the port of Bristol, with a cargo of valonia. That about five P. M. of the following morning, whilst lying at anchor in about ten fathoms water, the signal light, consisting of a large glass globe lamp, giving a clear and strong light, and visible at a very considerable distance, was made fast to the inner jib-stay. That the wind was blowing fresh from the west, and the tide flowing, the weather being thick at the time, but not so thick but that signal lights in common use on board vessels might be seen at five or six cables' length off. That between half-past five and six P. M., a large vessel (The *George*) was descried by the mate at the distance of between two and three cables' length, running from the west directly in a line for the schooner. That the mate immediately called to the master, who was below in the \*cabin, and who [ \*387 ] thereupon instantly ran upon deck, and loosening the tiller, which had been fastened to keep it steady, put it hard a-starboard into a rope becket, seeing a collision was inevitable, and then went forward. That before the master had passed the foremast, The *George* drove athwart the hawse of the schooner, and carried away her bowsprit, and stove in her bows, besides doing other damage. That the violence of the collision causing the chain of the schooner to part, both vessels drove against the bark *Ireland*, then at anchor about three cables astern of the schooner, whereby the said schooner received further damage, and eventually sunk, and was totally lost. That the said schooner had since been raised, and sold for the sum

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<sup>1</sup> [S. C. 4 Notes of Cases, 161.]

<sup>2</sup> [The *Gipsy King*, 2 W. Rob. 547 ; The *Lochlibo*, 1 Law & Eq. Rep. 651.]

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The George. 2 W. Rob.

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of 1317. That the said collision was entirely owing to the want of a good look-out on board 'The George; and had such a look-out been kept the said schooner must have been observed in sufficient time to have enabled 'The George to alter her course, and so to have gone clear of the schooner.

The defence of the owners of 'The George denied that the accident was occasioned by neglect or a want of a good look-out on the part of the crew of 'The George, but was mainly attributable to the intense darkness of the night. That in pursuance of the provisions of the statute 47 Geo. III. c. 33, s. 9, intituled "An Act for establishing the Rates of Wharfage, Anchorage, Moorage, &c., at the lawful Quays in the Port of Bristol, and for the better Regulation of Pilots and Pilotage navigating the Bristol Channel," the master of 'The George, on reaching Lundy Island, on the morning of the 11th, endeavored to procure a pilot; and that immediately upon J. B., a duly licensed pilot, coming on board, he put his vessel under the charge [ \*388 ] and command of such pilot; and that \*the said ship, at the time of the collision, was in the entire charge and command of such pilot; and that all his directions were promptly and efficiently obeyed by the crew. That by reason of the premises, if the collision had not been accidental, which it was alleged to be, it was occasioned by the misdirection of the pilot; and that the owners of the said ship were not responsible.

The court was assisted by Trinity Masters, and the case was argued on the 3d and 6th instant by

*Addams and Jenner*, on behalf of 'The Nora Creina.

*Queen's Advocate, Robinson*, and *Bayford*, for 'The George.

#### JUDGMENT.

DR. LUSHINGTON. When this case was argued at the bar, I was attended by two of the elder brethren of the Trinity Board; and entertaining a strong impression on my own mind, that a previous error had been committed by 'The George in proceeding as she did into the King's Road, I put it distinctly to those gentlemen to consider whether, looking to the state of the wind and weather, 'The George ought not to have brought up sometime previously and waited until the following morning, or that, if that measure was impracticable, to have slackened her course and proceeded up the channel with the tide.

The Trinity Masters, having duly and carefully considered these questions, are of opinion, that an error was committed by 'The George

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The George. 2 W. Rob.

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in not bringing up as suggested. At the same time they state that it is entirely within the province of the pilot to direct the time and place in which a vessel should be \*brought up, and that [ \*389 ] the master must be governed upon these points exclusively by the judgment and direction of such pilot. The opinion thus expressed by the gentlemen of the Trinity House is *prima facie* an exoneration of the owners in point of law from all responsibility for the damage occasioned in this case by the want of judgment in the pilot. Another important point in the case, however, remains to be noticed, a point upon which I confess I felt no little difficulty upon the last court day,— I mean whether, considering the darkness of the night and the tempestuous state of the weather, a good and sufficient look-out was kept on board The George, just prior to the period when she reached The Nora Creina.

Now, in order to deprive the owners of The George of their legal exemption from liability under the statute, upon the ground of a want of a good look-out, there must undoubtedly be full and convincing proof that there was an actual neglect and want of care in this respect on the part of the master and crew of that vessel. The mind of the court must be legally and conclusively satisfied of such neglect; and if the evidence be contradictory and at all evenly balanced, it would be impossible for the court to decide affirmatively, so as to saddle the owners of The George with the consequences of this unfortunate collision.

Looking to the depositions in the cause, there is, I must say, much conflicting evidence, both as regards the degree of darkness that prevailed at the time and the period when the two vessels were seen from each other. In the evidence of The George, the night is described by some of the witnesses as “awfully dark,” and the collision is stated to have been instantaneous and inevitable. On the other side it is affirmed by some of the witnesses of The Nora Creina, that upon the night \*in question ships were [ \*390 ] visible at three or four cables distance; and the mate of the vessel expressly swears, that, after the time when The George was first seen, and before the collision ensued, he called up the master, who was below, and that he thereupon came on deck, and loosening the tiller, which had been fastened to keep it steady, put it hard a-starboard, into a rope becket, and then went forward.

When the case was argued I was certainly much struck with the evidence of the mate upon this part of the case, and upon this consideration, namely, that if the persons on board The Nora Creina had perceived the approach of The George at any considerable distance, it would furnish a fair presumption that The George, if she had kept

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The Lord Seaton. 2 W. Rob.

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a good look-out, might also have descried The Nora Creina. To this point in the case, therefore, I particularly invited the attention of the gentlemen of the Trinity House, with a view of ascertaining what length of time must have been occupied in carrying out the measures so adopted by The Nora Creina. It is the opinion of those gentlemen, that these measures would have occupied but a very short space of time; and it is also to be here remembered, that in the protest of The Nora Creina it is distinctly stated, that between the first approach of The George and the collision, an interval only of about two minutes elapsed. Under all the circumstances of the case, considering that the evidence on both sides is more evenly balanced than usually happens, I must pronounce that The George is not liable for the consequences of this collision, and that the owners of that vessel must consequently be dismissed. I shall, however, decline to accompany my sentence with any order as to costs: I can give no costs.

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[ \*391 ]

THE LORD SEATON,<sup>1</sup> Fitzsimons.

June 12, 1845.

Declaration of the pilot in charge of a vessel proceeded against in a cause of damage, that the collision was not his fault, but was occasioned by the neglect of the crew of the damaging vessel, not pleadable in a cause by plea and proof.

Declaration of a mariner belonging to the damaging vessel, confirming the pilot's assertion, also inadmissible.

Investigation into the alleged misconduct of the pilot before a pilot committee of the port of Liverpool; decision of such committee, that the pilot was not to blame, not receivable as evidence in the cause.

THE question in this case was as to the admissibility of certain articles in a libel in a cause of damage by collision.

The three first articles of the libel pleaded generally the circumstances under which the collision took place, and were not opposed.

The fourth article pleaded, that immediately after the collision, in the next preceding article pleaded, and when on board the said ship, John Scott, a duly licensed pilot of the port of Liverpool, the pilot in charge of The Lord Seaton, observed to the said Thomas White, that the collision was not his, Scott's, fault, for he had told the man at the wheel to keep the ship away, and give the brig a berth. That

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<sup>1</sup> [S. C. 4 Notes of Cases, 164.]

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The Lord Seaton. 2 W. Rob.

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the said John Scott, then in the presence of the said Thomas White, asked the man at the wheel what orders he had given him, and he answered that his orders were to keep the ship away, but he had misunderstood them, and luffed, or to that effect; and this was, &c.

The fifth article pleaded, that after the arrival of the said ship, Lord Seaton, in the port of Liverpool, in consequence of the said Thomas White and John Scott, the pilots respectively in charge of the said vessels, as before pleaded, being duly licensed pilots of the port of Liverpool, a meeting of the Pilot Committee of the said port was held on Monday the 21st day of April aforesaid, at the pilot office in Liverpool aforesaid, for the purpose of investigating the conduct of the said pilots respectively. That J. J. L., the French consul at Liverpool, A. L., and A. D., the mate of the said brig, A., one of the \*consignees of The Lord Seaton, and the said [ \* 392 ] Thomas White and John Scott, attended such inquiry, and that the said pilots were examined by the said committee. That the master of The Lord Seaton was also summoned to attend the said inquiry, but refused to appear before the said committee, to be examined as to the cause of the said collision. That after such inquiry had been concluded, a resolution was passed by the said committee, that no blame attached to the said pilots, or to the people on board the said brig; and this was, &c.

The admission of these two articles was opposed.

#### JUDGMENT.

DR. LUSHINGTON. The learned judge having adverted to the contents of the three first articles of the libel, observed to the following effect:— With respect to the first part of the fourth article of this libel, I am of opinion, that it is altogether inadmissible, and for this reason, that it does not refer to any of the facts which occurred at the time of the collision, but relates to a conversation which is stated to have taken place between the pilot of the vessel which is charged with the damage, and the pilot of the vessel which has been run down; it amounts, in point of fact, to a mere simple declaration on the part of the pilot not on oath; and the declaration of such pilot, it appears to me, cannot be received as evidence, inasmuch that the owners of The Lord Seaton, having compulsorily taken the pilot on board, are exempt from the responsibility, and the pilot himself is amenable for the consequences of the collision in question.

The latter part of the article is, I think, equally inadmissible, as being the mere declaration of a seaman on board The Lord Seaton, which it is sought to \*make evidence against the own- [ \* 393 ] ers of that vessel. I am not aware of any case in which the



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The Westmoreland. 2 W. Rob.

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declaration of a common mariner has been received as evidence against the owner of the ship. The only principle on which such declarations are received, is, I apprehend, confined to cases where the party making the declaration is the agent of the owners. This principle, it is clear, does not apply in the present instance, and for this reason I am of opinion that the whole of this article is inadmissible.

I am the more strongly inclined to this opinion, from the consideration that the exclusion of this article will entail no prejudice upon the case of the owners of The Marie Therese.

If the owners of The Lord Seaton produce this mariner as a witness, the question may be put to him upon interrogatory, and if he denies it, an allegation exceptive to his credit may be given in upon such his denial. On the other hand, if the owners of The Lord Seaton do not produce him, it will furnish a strong presumption that he did act as stated.

The fifth article pleads, that there is a pilot committee at Liverpool, charged with the general investigation into the conduct of all pilots, whether they do right or wrong. I have no hesitation in saying that there is no principle whatever upon which the decision of such a committee can be received as evidence in a case of this description. The investigation of such a committee is a mere *ex parte* investigation, made for totally different purposes. Whether they take evidence on oath I do not know; how the investigation is conducted I cannot tell; but of this I am certain, that the decision of such a committee cannot, upon any principle, be received [ \* 394 ] as evidence in the cause, \*and I must, therefore, direct that this article should be struck out.

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THE WESTMORELAND,<sup>1</sup> Rendall.

*Motion.*

June 24, 1845.

Not competent for magistrates to levy distresses upon a vessel in the custody of the Court of Admiralty at the suit of seamen for their wages, under the stat. 7 & 8 Vict. c. 112.

Monition decreed against an auctioneer who had acted upon the magistrates' warrants, and had removed part of the tackle and furniture of the ship.

In this case the vessel had been arrested in the cause of bottomry

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<sup>1</sup> [S. C. 4 Notes of Cases, 173.]

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The Westmoreland. 2 W. Rob.

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upon the 3d of May, 1845. Upon the 3d of June, the third default was prayed, and upon the same day, R. T., an auctioneer, acting under warrants issued by the magistrates of South Shields, proceeded to levy distresses upon the vessel for seamen's wages, and advertised the tackle, apparel, &c., for sale on the 5th. Upon the 7th of June, the case was brought to the notice of the court, and a notice was directed to be given to R. T. not to remove, or if removed to restore, the ship's furniture, and under pain of an attachment. The tackle, &c., of the vessel having been sold upon the 5th of June, and carried away, a monition was now prayed against R. T., to show cause why he should not be attached for contempt of court.

PER CURIAM.

I have no hesitation in granting this motion; at the same time I wish that the application had been made to the court at an earlier stage of the proceedings.

The vessel, it appears, was arrested upon the third of May, in a cause of bottomry; and subsequent to the arrest, and whilst the ship was in the custody of this court, nine several distresses were levied upon her by certain magistrates of South Shields, at the suit of the seamen for their wages. It further appears, that after the \*distresses had been levied and before the 5th of June, the [ \* 395 ] tackle, apparel, and furniture of the vessel were taken out and removed; and upon the 5th of June they were sold at a public auction by R. T., an auctioneer of Newcastle-upon-Tyne.

Now, I know not whether at the time these distresses were levied the magistrates were or were not in ignorance of the proceedings which had already been commenced against the ship under the authority of this court. I have, however, no hesitation in asserting that the statute 7 & 8 Vict. c. 112, could give them no jurisdiction whatever to interfere under the circumstances of the case. How can the proceeds of a ship be brought into the registry of this court to be dealt with according to law, if another jurisdiction can thus incidentally take the vessel out of the hands of the court. The act of parliament never intended any such construction of the 15th section; and I wish it to be understood, that if in future cases of this kind any similar attempt be made to infringe upon the authority of this court, I will, upon due notice being given to the court, most assuredly attach the parties by whom such interference is attempted. I decree a perishable monition to issue, and also a monition to show cause why an attachment should not be issued against the auctioneer by whom the ship's furniture was removed; and in so doing I repeat my regret that earlier measures were not adopted. It is the duty of persons who

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The Repulse. 2 W. Rob.

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are in possession of a ship under the authority of this court to give the earliest intimation to the court if any attempt be made to infringe that authority.

Motion granted.

[ \* 396 ] Upon the 5th July affidavits were brought in on \* behalf of R. T., stating his readiness to reinstate the property which had been taken out of the vessel and sold, but praying further time for that purpose; and upon 3d September it was admitted in acts of court, that the order of the court had been complied with, whereupon R. T. was dismissed, but condemned in the costs of the proceeding.

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THE REPULSE,<sup>1</sup> Marquis.

May 24, 1845.

A written agreement to stay by a vessel in distress and see her safe into port for the sum of 500*l.*, signed by the masters of the two vessels, upheld by the court.<sup>2</sup>

Plea of the salvors, that the agreement was conditional, and signed upon the understanding that the service was not to extend beyond the following morning, overruled.

In this case The Repulse having been much damaged by stress of weather on her homeward voyage from India, the master, when about 85 miles from Algoa Bay, entered into a written agreement with the commander of The Prince of Waterloo to stay by and assist The Repulse into Algoa Bay. The agreement was to the following effect: —

‘ Ship Repulse, off Algoa Bay, 20 June, 1844.

“ I agree on the part of the owner and underwriters of the ship Repulse, of London, with Captain Elder, commander of the bark Prince of Waterloo, of Aberdeen, that he or his owners receive the sum of 500*l.* for remaining by the ship Repulse, seeing her safe, and rendering all and every assistance into port.”

On the part of The Prince of Waterloo a counter-agreement was signed by Captain Elder, the master, in these words: —

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<sup>1</sup> [S. C. 4 Notes of Cases, 141.]

<sup>2</sup> [The True Blue, 2 W. Rob. 176.]

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The Repulse. 2 W. Rob.

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" Ship Repulse, off Algoa Bay, 20 June, 1844.

" I agree to remain by the ship Repulse, see her safe, and render her every assistance into port, for which I have made the arrangements with Captain Marquis, commander of the above ship."

\* Upon the return of The Repulse to this country, a suit for [ \* 397 ] salvage was commenced by the owner, master, and crew of The Prince of Waterloo. The action was entered by the alleged salvors in the sum of 4,000*l.*; and in reference to the agreement it was pleaded, that the acceptance by Captain Elder was only a conditional acceptance of the terms specified in the agreement, Captain E. having signed the same upon the understanding that the ship would get into Algoa Bay upon the following morning. That after the agreement had been executed, Captain E. said to Captain M., " Now mind, if we don't get into Algoa Bay in the morning, this agreement is to be void, and I shall look for something else," to which Captain M. assented.

This statement was contradicted in the answer to the act; and a tender of 500*l.*, the amount of the original agreement, was made in acts of court.

#### JUDGMENT.

DR. LUSHINGTON. The learned judge having adverted to the facts, and to the alleged agreement, observed — 'There are two ways, and two ways only, by which contracts of this description can be annulled. The first is by proving that the contract was founded in fraud and misrepresentation, in which case it would be void *ab initio*; the second, by showing that it was cancelled by mutual consent. Neither of these points are established in the present instance. If this be so, I have only to consider this agreement according to the principles of construction which prevail in this and other courts. The very object of all written contracts is to prevent uncertainty and confusion, and to avoid that failure of memory which is incidental to all human transactions; if the rules by which these \* contracts [ \* 398 ] should be construed are relaxed, all the evil consequences which they were intended to prevent will be produced. Looking then to the terms in which the agreement is drawn up, its obvious meaning and intent is, that Captain Elder should stay by The Repulse, and see her safe into Algoa Bay, for the sum of 500*l.* This is stated clearly and without limitation. But it is said on the part of the salvors, that it was intended by Captain Elder as a mere conditional agreement; and a conversation is stated to have taken place, after the contract was signed, in which Captain Elder told Captain

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The Repulse. 2 W. Rob.

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Marquis if they did not get into Algoa Bay on the following morning the agreement was to be void. If this was the intention of Captain Elder that the detention was to be for one night only, why was not the stipulation introduced into the contract? Was it not within the power of Captain Elder to have said, "This contract I will not sign unless this condition be expressed in it?" I am of opinion that no circumstances are alleged which are sufficient to vitiate this agreement; and I am, therefore, bound to pronounce for the tender of 500*l.*, but I do not think it a case in which I should give costs.

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THE REPULSE,<sup>1</sup> Marquis.

June 24, 1845.

Privilege of masters to sue for their wages, under statute 7 & 8 Vict., confined to two cases.

1st. Where the wages are claimed to be due from a party who was owner of the ship at the time of the original contract.

2d. Where such owner is bankrupt or insolvent at the time when the claim is preferred.

Master of a vessel not debarred from suing under the act, upon the ground that he was a joint mortgagee of the ship, and that he was cognizant of the sale of the vessel by the other mortgagee and did not dissent from such sale.

In this case an action was entered against the same vessel by Captain Marquis, the master, to recover the sum of 1,800*l.*, due to him for his wages. The action was brought under the provisions of the act 7 & 8 Vict. c. 112, the original owners of the vessel having become bankrupts. The grounds upon which the master's claim was resisted are fully noticed and discussed by the learned judge in delivering his judgment.

[ \* 399 ] \* The case was argued by

*Haggard* and *Phillimore*, for the present owners.

*Addams*, for the master.

JUDGMENT.

Dr. LUSHINGTON. I must first direct my attention to the true con-

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<sup>1</sup> [S. C. 4 Notes of Cases, 166, reported again 5 Notes of Cases, 348.]

struction of the act of parliament upon which this suit is brought, an act which has conferred a great legal privilege upon the masters of merchant vessels by extending to them the same liens and remedies in regard to the recovery of their wages which heretofore belonged to the seamen and mariners alone.

The act in question is, in some respects, necessarily retrospective in its effect, inasmuch as it applies to contracts made between masters and owners antecedent to the passing of the act. Again, as relates to mortgagees and bottomry bondholders who might have liens upon a ship at the time the statute was passed, it puts the master (in the case specified in the act) upon the same footing as an ordinary mariner, thereby conferring upon him a priority of claim for the payment of his wages. It is no part of my duty to examine whether or not these consequences were duly considered by the legislature at the time the statute was enacted. I must take the act as it is, and put a legal construction upon it. Let me then first consider what are the cases specified in which the master is entitled to the privilege. The act provides, "that all the rights, liens, privileges, and remedies (save such remedies as are against a master himself,) which by this act, or any law, statute, custom, or usage, belong to any seaman or mariner in respect to the recovery of his wages, shall, in the case of the \*bankruptcy or insolvency of the owner of the ship, [ \* 400 ] also belong and be extended to masters of ships or master mariners in respect to the recovery of wages due to them from the owner of any ship belonging to any of her Majesty's subjects." From these words it appears that the privilege of the master is confined to two cases,—first, where the wages are claimed to be due from a party who was the owner of the ship at the time of the original contract; secondly, where such owner is a bankrupt or insolvent at the time when the claim is preferred. I am aware that cases may possibly arise upon the construction of this act which may be attended with great difficulty and complexity; as, for instance, in the case of the death of the owner, or the sale and transfer of the vessel during the progress of a voyage. In the latter case, it is obvious that the purchaser could not be considered as a party to the original contract; and it would be difficult to determine whether the contract was extinguished altogether, or whether an action would only lie for services had and performed. The present case is attended with no such difficulties; and I am clearly of opinion that the insolvency of the former owners of this ship in the present instance, is the insolvency contemplated by the act, and that it gives to Captain Marquis *prima facie* a remedy for his wages against the ship, unless his claim is defeated by any of the circumstances stated in the proceedings. In



the act on petition and in the affidavit of Captain Shuttleworth it is averred, that by the arrangement between Captains Marquis and Shuttleworth, prior to the sailing of the vessel, Captain M. became in point of fact, if not in law, a joint mortgagee of the ship; it is also further stated, that upon the return of the vessel to England, Cap-  
[ \* 401 ] tain Marquis was indebted to the owners \* upon the balance of his accounts. With respect to these averments, I am of opinion, that the mere circumstance, however distinctly proved, that Captain M. was a joint mortgagee with Captain S., can have no legal effect in barring his claim for wages in the present proceedings; at the same time, I have yet to learn that a master will be entitled to recover his entire wages in a suit in this court, if, upon a balance of his accounts, he is indebted to the owners. His claim must stand upon the same footing as the case of an ordinary mariner or seaman, where the wages are pronounced for, subject to all deductions for moneys received, or clothes, or other advances fairly and *bonâ fide* made. Whatever, therefore, may be my ultimate decision in this case, it will be competent for Captain S. to appear in court and have any of his claims investigated before the registrar and merchants, and no money will be paid out of the registry to Captain Marquis that shall not be found due upon a settlement of the accounts. It is not for a moment to be supposed that this court will ever suffer itself to be made the instrument to do an act of positive injustice, and such injustice it would commit if it were to give to Captain M. the whole of his wages, and thereby enable him to set the owners at defiance in respect to what is due from him on a settlement of accounts.

I now come to another averment in opposition to the claim of Captain Marquis, which is deserving of very grave consideration, namely, the averment that the ultimate sale of the vessel to Mr. Beach was made with the privity, sanction, and concurrence of Captain Marquis. This part of the case was much argued by the learned counsel at the bar; and it was strongly urged upon the court,  
[ \* 402 ] that in so consenting to the \* sale of the ship, Captain M. has waived his lien upon her, and by his own conduct has lost his privilege of suing against the vessel under the provisions of the recent statute. In support of this argument two cases were cited by the learned counsel; and I will now proceed to dispose of these cases, neither of which in my judgment has any bearing upon the point in issue. In the case of *Jacobs v. Latour*, reported in 5 Bing. 131, the principle laid down by the Court of Common Pleas was this, that where a stable-keeper has the possession of a horse, he has a lien upon that horse for the expenses of its keep so long as he retains it; but if he gives up the possession of that horse, his lien is gone. This

position is perfectly true, and the same principle would apply to a ship in dock; so long as the owner of the dock retains possession of the ship, he has a lien upon her for dock expenses incurred; but if he permits the vessel to leave the dock, his lien upon her is gone. Various other cases might be cited to the same effect; but the question is, does this principle apply to present case? I apprehend not; and for this reason, that Captain M. had no possession of any lien upon this vessel in the legal acceptation of the term. In the case of *Govett v. Richmond*, reported in 7 Sim. R., the principle laid down was to this effect, — where a person, having a claim upon property which is the subject of a reference, knows that the arbitration is going on, but does not bring forward his claim, he will be bound by the award. In the present case there was no legal proceeding to transfer the title to this vessel, and it was merely a private transaction between Captain Shuttleworth and Mr. Beach.

Having thus disposed of these cases, I will, in conclusion, examine with some particularity the circumstances \* under [ \* 403 ] which it is alleged that the sale in question took place. The vessel, it appears, arrived in this country in January last, and at the end of that month the sale took place. Mr. Heaviside swears in his affidavit, that the question of selling the ship was discussed in a meeting at which Captain M. was present, and that Captain M. was consulted, and fully authorized the sale of the ship. He further swears, and in this he is confirmed by Mr. Turner, that immediately after the meeting he made an entry in his journal to this effect, "Captain M., in the presence of Mr. Turner and myself, agreed that Captain S. was to sell *The Repulse* for 6,000*l*." Now, I have no hesitation in giving to these gentlemen entire credit for an intention to speak the truth. I feel, however, this difficulty with respect to the reception of their evidence as it is thus given in their affidavit, namely, that it conveys only the impressions of their own opinion of the result of the conversation, and not the materials from which this opinion is drawn. This is one of the difficulties with respect to this part of the case; and I feel that, sitting as a judge in a court of justice, I am not at liberty to rely with safety and satisfaction upon such evidence. On the other hand, Captain M. gives a long and detailed account of what took place on the occasion in question. He states that Captain S. observed, "I am offered 6,000*l*. for the ship, and I don't think I shall get more. Do you think I ought to take it?" That he, Captain M., replied, "You are the best judge; you can do as you like." Upon which Captain S. said, "I think I shall close;" and deponent said, "You know best." That he, Captain M., then left, and Captain S. subsequently informed him he had sold the vessel for 100*l*.

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La Constancia. 2 W. Rob.

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more. He further states, that he had no reason to believe [ \* 404 ] at the time \* that any opposition would be made to the payment of his wages; and that he acted under the impression that Captain S. had full power to effect the sale, and that his sanction and assent was not necessary and was not applied for. The result of Captain M.'s statement, then, is this, that he was cognizant of the intended sale of the vessel, and he did not dissent from it. The question arises, does this non-dissent, if I may use the expression, in other words, this tacit assent or abstaining from dissent on his part, bar him from his right to sue the present owners? I apprehend not; and for this simple reason, that he had no legal power of assent at all, and that his consent was in no degree necessary to complete the sale. Upon the whole view of the case, therefore, I am of opinion that Captain M. is legally entitled to proceed in this suit; at the same time it must be distinctly understood, that he will not recover from the hands of the court one sixpence more than he is entitled to upon a fair settlement of accounts.<sup>1</sup>

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LA CONSTANCIA.<sup>2</sup>

(*Motion.*)

November 14, 1845.

Where a bondholder advances his money upon the security of the ship alone, it is not competent for him to extend that security beyond the express terms of the bottomry bond.

Three bonds of bottomry granted upon the same vessel; two of the bonds granted upon the ship alone, the third bond upon the cargo only.

In marshalling the assets, the court directed the two bonds upon the ship to be paid out of the proceeds of the ship exclusively; the bond upon the cargo to be paid out of the proceeds of the freight in the first instance, and the cargo only held liable if the proceeds of the freight should be insufficient.<sup>3</sup>

In this case, three bonds of bottomry were granted upon this ship.

The first bond was executed upon the 27th of February, 1845, and hypothecated the ship only; the second bond, bearing the same

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<sup>1</sup> [See report of further hearing, 5 Notes of Cases 348.]

<sup>2</sup> [Reported again *post*, pp. 460 and 487.]

<sup>3</sup> [The Trident, 1 W. Rob.]

date, hypothecated the cargo only; and the third bond, dated the 9th of April, was upon the ship alone. The validity of the several bonds was not disputed; and the ship having been sold under a decree of the court, the \*question arose as to the [ \*405 ] funds out of which the several bonds should be paid.

**JUDGMENT.**

**DR. LUSHINGTON.** The validity of these bonds is not disputed, and the question which I have to determine is confined to the consideration of the funds out of which the several bonds are to be defrayed. The vessel, it appears, was bound on a voyage from Lima to London, with a cargo of silver and guano, and, having met with damage at sea, was compelled to put into Bahia to refit. The silver on board was applied, in the first instance, in payment of the repairs; but not being sufficient to cover the whole of the expenses, the master was obliged to take up money on bottomry, for which he executed a bond, bearing date the 27th of February, 1845, and which bond is upon the ship alone. Subsequent to the departure of the vessel from Bahia, she met with a collision, and was compelled to return to that port for further repairs. For the payment of these repairs, further advances of money were required by the master, and a second bond of bottomry was executed by him upon the cargo only. A third bond was also given, dated the 9th of April, 1845, and this bond purports to hypothecate the ship, without any reference to the freight or the cargo on board.

Now, with respect to these bonds, I am of opinion that the bond of the 9th of April, being the last in point of date, is entitled to the priority of payment, and that the payment thereof must be defrayed exclusively out of the proceeds of the ship. I conceive, also, that the original bond of the 27th of February must likewise be defrayed out of the same proceeds; and if these proceeds should prove insufficient to cover the two bonds, the loss must fall upon the \*bondholders; and for this obvious reason, namely, that [ \*406 ] they have themselves chosen to limit their security to the ship alone; and there is no principle of law which will enable them to extend that security beyond the express terms in which the instrument of hypothecation is couched. With respect to the remaining bond, which is upon the cargo only, although in the present instance its validity is not contested, I can only pronounce that it is valid in point of law, upon the assumption that the hypothecation of the ship, freight, and cargo, were contemplated by the contracting parties when the bond was executed. The ship and freight, undoubtedly, form the primary resources for the discharge of all bottomry bonds,

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The Batavier. 2 W. Rob.

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and the cargo is only liable when these resources are exhausted. This doctrine was laid down by Lord Stowell, in the case of *The Gratitude*; <sup>1</sup> and, in deciding the present question, I shall adhere to the authority of that decision.

If, then, the proceeds of the ship should be exhausted, in the present instance, in the payment of the two bonds of the 27th of February and the 9th of April, the intermediate bond, which is upon the cargo, must be satisfied, in the first instance, out of the proceeds of the freight; and, when these are expended, the bondholder will be entitled to fall back upon the cargo. I make this decision upon the principle that, where there are several bonds upon different securities, I am bound so to deal with the assets that one security should not be exhausted at the expense of the other, but that the claims of all the creditors, if possible, should be satisfied.

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[ \* 407' ]

\* THE BATAVIER.<sup>2</sup>

December 17, 1845.

Where a vessel at anchor is run down by another vessel under weigh, the *onus probandi* lies with the vessel doing the damage, and she is bound to show that the accident was not occasioned by any fault or negligence on her part.<sup>3</sup>

The exemption from liability, under the Pilot Act, not taken away from the owners of the damaging vessel by the constant employment of the same pilot to pilot their vessel up and down the river, for a period of fifteen years.<sup>4</sup>

In this case *The Batavier*, a steam-vessel belonging to the Netherlands Steam Navigation Company, whilst on her passage from London to Rotterdam, came into collision in the river with *The Topaz*, another steamer, belonging to the Gravesend Steam Packet Company. *The Batavier* was in charge of a duly licensed pilot, and the collision took place off Gravesend; *The Topaz* being at the time anchored by a single anchor, about 200 or 300 feet from the North or Essex shore. Two questions were raised: first, as to the general merits; and, secondly, how far the owners of *The Batavier* were

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<sup>1</sup> [3 C. Rob. 240.]

<sup>2</sup> [S. C. 4 Notes of Cases, 356.]

<sup>3</sup> [*The Scioto*, 1 Davies, R. 359; *Strout v. Foster*, 1 How. S. C. Rep. 89; *The Victoria*, 3 W. Rob. 49, 52.]

<sup>4</sup> [*The Eden*, 2 W. Rob. 442.]

liable for the damage ; the pilot being taken on board by preference and not compulsorily, and having been constantly employed by the owners of The Batavier in piloting their vessels up and down the river for a period of fifteen years.

JUDGMENT.

DR. LUSHINGTON. Gentlemen — I must first direct your attention to what is the presumption of law, when a vessel at anchor is run down by another vessel. I conceive it to be this : — That the vessel under weigh is bound to show, by clear and indisputable evidence, that the accident did not arise from any fault or negligence on her part ; and for this obvious reason, that a vessel lying at anchor has no means of shifting her position or escaping the collision. It is, I apprehend, the bounden duty of the vessel under weigh, whether the vessel at anchor be properly or improperly anchored, to avoid, if it be possible with safety to herself, any collision whatever. This is not only the doctrine of the maritime law, but it is also the doctrine of the common \* law, with respect to carriages on [ \* 408 ] the high road. Supposing a carriage to be standing still, and be on the wrong side of the road, it would be no justification for another carriage, which might be on the right side of the road, to run into that carriage, if the driver could avoid it without risk to himself. Bearing this principle in mind, let us now look to the general features of this case, and then consider who are the parties to blame in the present instance. It appears, from the statements on both sides, that The Topaz was anchored near to the north shore, and was lying between 200 and 300 feet from the shore. If this be so, the question arises, whether the course pursued by The Batavier, in going to the N. E., was a fit and proper course to be pursued ? This must depend upon various considerations. In the first place, whether, in your opinion, there was sufficient width and space to allow The Batavier to have gone in any other direction with safety. Another consideration is, whether there was sufficient breadth and depth of water to the S. W., to have enabled her to take that particular direction. The case which is set up on behalf of The Batavier is this : — That, in order to pass The Topaz to the east in the best water, there not being water enough to permit The Batavier to go either over the Whiting Shoal or to the west thereof, the pilot called to the man at the wheel to put the helm a-starboard. If this statement be true, and you are of opinion that there was sufficient space and depth of water to the west, to have enabled The Batavier to have taken that course with safety, The Batavier, I apprehend,



had the option of an open course, without the necessity of running a risk of any collision whatever.

Under these circumstances, leaving you to fix the precise [ \* 409 ] position of The Topaz, I shall request your \* opinion upon the following points. In the first place, did The Batavier pursue a proper course in going to the eastward of The Topaz? And, secondly, was The Topaz anchored in a proper place, and in a proper manner? In considering the last point, you must recollect that The Topaz had been recently repaired and was just come out of dock, and that she was at anchor only for the purpose of getting up her steam, and of proceeding on her course. Was it then necessary, as a matter of proper maritime precaution, that she should have had two anchors down? With respect to the averment that, just prior to the collision, the helm of The Topaz was altered, I can find no evidence to substantiate the fact; and it is directly opposed and contradicted in the evidence of the master, who swears that the helm was kept hard a-port.

Gentlemen — There remains only one further point to which it is necessary that I should direct your attention; and that is, whether, in your opinion, there was any neglect on the part of the master or any of the crew of The Batavier? Such neglect could only arise, in the present instance, either from the want of a proper look-out, or from an imperfect execution of the orders given by the pilot. As regards the former, it is to be borne in mind that both the master and the pilot were upon the paddle-box at the time; and, as far as I can discover, there is no evidence whatever to fix upon the master or any of the crew a failure in obeying the pilot's directions.

The *Trinity Masters* having considered the points submitted by the learned judge, were of opinion: —

That The Batavier did not pursue a proper course in going to the N. E. of The Topaz; and that no blame whatever was [ \* 410 ] attributable to The Topaz, either in \* respect to the place or the manner in which she was anchored. They were also of opinion that there was no neglect on the part of the crew of The Batavier, in not keeping a good look-out, or in not executing the orders of the pilot when such orders were given.

The COURT having pronounced for the damage, a question was raised respecting the liability of the owners of The Batavier; and it was submitted, by the counsel for The Topaz, that the provisions of the statute did not apply to exonerate them, under the circumstances of the case; inasmuch that the pilot on board The Batavier had

been in the constant employment of that vessel, as pilot, from the year 1830; and that he was taken on board, not compulsorily but voluntarily, in the present instance, and was, consequently, to be considered as the servant of the owners.

On behalf of the owners of The Batavier it was urged — That, in order to deprive the owners of the benefit of the statute, it must be shown that the pilot was exclusively their servant; and that the simple fact of the pilot having always, with two exceptions, conducted the vessel to and from Gravesend, created no difference in the law of the case. Under the Pilot Act, the owners were bound to take a pilot on board; and as this person was well acquainted with the master and crew of The Batavier, it was natural that the master would prefer having him to any other pilot. It was as preposterous to urge this preference as a bar to the owner's privilege under the statute, as it would be to contend that a soldier, who had liberty to choose which of six drummers should flog him, in making the selection proved that the receiving of the flogging was voluntary.

\* PER CURIAM.

[ \*411 ]

The Trinity Masters and myself being of opinion that the collision was occasioned by the default of the pilot, I have now to determine whether the particular circumstances of this case take away from the owners their exemption from responsibility under the provisions of the Pilot Act. The first ingredient to bring the case within the act is, that the damage is occasioned exclusively by the fault of the pilot. This is established in the present instance. The next ingredient to exonerate the owners is, that the pilot received on board should be a duly licensed pilot. In the present case this requisite of the law also is satisfied, because it is admitted that the pilot was duly licensed; and if he had been accidentally picked up in the port of London, and took charge of the vessel, the owners would be exonerated. It is alleged, however, that this pilot has been constantly engaged and employed in the service of the vessel as pilot, from the year 1830 up to the present period; and that upon this account he is to be considered rather as a servant voluntarily engaged by the owners, than as an ordinary pilot taken under the compulsory provisions of the statute. I confess that I am altogether unable to accede to the force and propriety of his argument. The great object of the legislature was to insure duly licensed pilots being placed on board all vessels of a certain tonnage navigating the rivers and ports of this country. There is no restrictive enactment to prevent any individual duly qualified from accepting or undertaking a constant and permanent

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The Hebe. 2 W. Rob.

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engagement. I am well aware, that, when a vessel is at sea and a pilot puts off, there is a compulsion upon the master to receive such pilot, if he be the first that presents himself; but I have yet [ \*412 ] to learn that when vessels are \*lying in port and about to sail, the master and owners have no right to select their own pilot, provided he be properly qualified to conduct the vessel. It would, I conceive, be highly detrimental to the interests of navigation if such a position could be maintained. On the contrary, I consider it highly advantageous, not only to the owners of vessels but to the public at large, that the same pilot should be constantly employed on board a vessel, inasmuch as he becomes thereby well acquainted with the master and crew, and is consequently more likely to conduct the vessel amicably and properly. Under the circumstances of the case, then, I am of opinion, that the owners of The Batavier are clearly exonerated in the present instance, and I must dismiss them accordingly.

*Dr. Curteis.* With costs?

PER CURIAM.

No. If you had admitted the facts and rested your defence upon the Pilot Act, I should have given you your costs; but as you have put in controversy a variety of facts, which have been proved against you, you are not entitled to costs.

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### THE HEBE, Hampton.

January 13, 1846.

Advances made for the service of a ship, to pay debts *bonâ fide* incurred previous to the advances, may be legally included in a bond of bottomry.<sup>1</sup>

The general validity of a bond will not be vitiated by the fact that the lender of the money was himself partially indebted to the ship at the time he lent the money, the bond will be invalidated *pro tanto* only; and the amount of the deductions must be ascertained by reference to the registrar and merchants.

THIS was a question as to the validity of a bottomry bond executed by the master at Sydney in New South Wales. The various plead-

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<sup>1</sup> [See The Ariadne, 1 W. Rob. 419; The Virgin, 8 Peters, 538; Abbott on Ship 6 Amer. ed. 156, note; The Ocean, 2 W. Rob. 465.]

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The Hebe. 2 W. Rob.

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ings in the cause were discussed by the court at considerable length upon the admission of a rejoinder. (*Vide supra*, vol. ii. pt. 1, p. 147.)

The case was now argued upon its merits by

*Haggard and Harding*, for the bondholder.

\**Addams and Robinson*, for the owner.

[ \*413 ]

The grounds upon which the validity of the bond was contested are noticed *seriatim* in the judgment of the court.

#### JUDGMENT.

DR. LUSHINGTON. It appears that the proceedings in this case were commenced as far back as the month of August, 1841; but the delay which has occurred is sufficiently explained by the fact, that the bond was executed at Sydney in New South Wales, and all the material evidence in the cause has of necessity been supplied from that distant country. From the arguments which have been addressed to the court, I collect that the opposition to the validity of the bond is rested upon three grounds. The first objection is, that all or the greater part of the advances for which the bond was given, were for the liquidation of debts incurred previous to the time when such advances were made. Assuming the fact to be so, the question arises, is it fatal to the validity of a bond of bottomry that the whole or a considerable part of the money advanced is to be applied to the payment of debts already incurred, that is to say, provided such debts be *bonâ fide* incurred for the necessary disbursements of the ship? My own experience in this court supplies me with no principle or authority to any such effect. On the contrary, looking to the practice of the court in former questions of this description, I apprehend that it is a matter of every day occurrence in this class of cases, that money is advanced on bottomry in part at least for the payment of debts already incurred. It would, I conceive, be repugnant to all principles of justice and equity to \*prohibit the lending of money on bottomry [ \*414 ] for the payment of such debts, leaving the creditor at Sydney or elsewhere to follow the master or owner to England for his money. It would also, it seems to me, be most highly detrimental to the interests of the shipowners themselves if any such rule prevailed, inasmuch that they would be obliged to furnish credit at every port into which the ship might enter: for who would trust the master alone? Again, would such a rule tend to advance the completion of voyages of this very description? I think not; and for this reason, that, if the ship could not be arrested, the master might in all ordi-

nary cases, if not in this particular case, be detained,—and how is the ship to proceed without him? As regards the owners of the vessel, they would surely have no reason to complain, because the debts to be paid must be the proper and just debts of the ship for which they ought to have provided. If they neglect to do so, or the master abuses his trust, who is to suffer? Not the innocent creditor, but the principal for the acts of his agent. In order to satisfy my own mind, I have attentively examined the various cases of bottomry to be found collected in the reports; and I feel that I am supported in this view of the matter by the decisions which have been heretofore delivered in this court.

The whole of the argument upon this part of the case seems to have been founded upon a misapprehension of the principle so often adverted to in cases of this kind, that if a person advances money, or undertakes repairs, or furnishes necessaries to a vessel upon the personal security of the owners, he shall not be at liberty, by taking a subsequent bond from the master, to convert that security into a bottomry security. To this doctrine, as a position of law long [ \* 415 ] established and recognized in the practice of this court, I entirely accede. At the same time I would observe, that the principle upon which this doctrine is founded has no application to the present case. The principle upon which such doctrine is founded is this, that no man shall be at liberty to alter a contract into which he has already entered, without the consent of the other contracting party, and to his prejudice. He has chosen his security, and by that he must abide. As at common law a creditor is precluded from altering a simple contract debt into a bond debt by his own act and deed, upon the same reason a person who advances money for the service of a ship upon personal security in the first instance, cannot *ex mero motu*, although with the concurrence of the master, convert the transaction into a bottomry transaction. Many other distinctions might be pointed out between the two cases; but I do not think it necessary to dwell longer upon this part of the case; the point does not properly arise in this stage of the proceedings; it ought rather to have been mooted as matter of objection to the report of the registrar and merchants. I have, however, thought it right to deliver my opinion upon it because it was contested at the bar; and I have no hesitation in saying, that if the fact was most fully established, it would not affect the general validity of the bond in issue: the utmost limit, to which the objection could extend, would be the possible disallowance of some specific items in the bond.

I now come to a second objection against this bond, which is set forth in the rejoinder in these words,—“Deacon further expressly

denies that R. G. Dunlop was not in any manner indebted to the brig or her owners at or for some time prior to his pretended advances on bottomry on account of the brig; on the \*con- [\*416 ] trary, he was at such times indebted to the brig or her owners."

Looking to the terms in which this averment is worded, I must say that I feel some little difficulty in ascertaining the real purport and intention for which it is made. It is abundantly clear that Dunlop was, at a time anterior to the advance of the money, indebted to the ship. He was the person who chartered her on her last voyage, and was indebted in the balance of the freight upon the completion of that voyage. The question, however, is not whether he was in debt anterior to the taking of the bottomry bond, but whether he was in debt at the time when the money was advanced. If he were in debt some short time previously, and had discharged that debt before the advance on bottomry was made, the averment is altogether immaterial. If it be meant that he was in debt to the ship when he advanced the money, to the extent of the money advanced, the fact is of great importance, because no man can advance money on bottomry who is so indebted at the time.

In order to elucidate this part of the case, which is thus obscurely alleged, and which ought to have been stated with the utmost precision, a large mass of accounts have been brought in; but I do not think it necessary to go through these accounts in detail: it is sufficient to say, that neither the accounts nor the evidence satisfy my mind that Dunlop was a debtor to the ship or her owners to the amount of the money which has been advanced upon this bond. Whether he was at all indebted, and to what extent, it is unnecessary for me to decide upon the present occasion; and for this reason, that if he was in debt to the ship at the time of the advance, but not to the amount advanced, the consequence would be that the bond would be invalid *pro tanto* only; and the proper \*tri- [\*417 ] bunal to investigate that question in the present instance is before the registrar and merchants by whom the necessary deductions must be made. The third and last objection refers to the conduct of Mr. Dunlop in paying over certain freight money to Malcolm, the master, notwithstanding the express direction to the contrary by Mr. Turcon, a brother of one of the owners.

In support of this averment an affidavit has been sworn by Mr. Turcan, in which he states that he represented to Mr. Dunlop that the owners were desirous the brig should be sent home to England; and that he cautioned Messrs. D. & Co. to see that the freight of the brig was properly applied for the benefit of the vessel, or remitted to the owners.



Assuming the fact to be as stated, the question arises, could Dunlop on such a warning have legally withheld the money from Malcolm, then in command of the vessel? With whom was the contract which Dunlop had entered into?—The only existing contract was between Dunlop and Malcolm? Who was Malcolm? Was he not the master still in command, and employed in such a course of navigation as empowered him to let the vessel on freight? Can any person doubt that an action might have been brought at Sydney at the suit of Malcolm to recover from Dunlop the freight that was due? What would be the defence? what could Dunlop plead?—Not that the freight was not due, but that he had been told by a brother of one of the owners to withhold it, there being no evidence to show that Mr. Turcan had any authority from the owners for the purpose. I cannot conceive that such a defence, even if capable of being put into a legal shape, could have availed in a court of law; and it is [ \*418 ] not my business to inquire whether a court of equity would have interfered. Mr. Dunlop in my opinion was perfectly justified in not involving himself in the risk of any such proceeding. As regards the alleged payment of the freight money to the master, therefore, I see no ground whatever for sustaining the charge of collusion against him, a charge which has been rather insinuated in the argument than distinctly averred in the pleadings. Even assuming that the money was paid incautiously and improperly, I do not consider that such a payment could affect the validity of a bottomry bond subsequently taken, unless the payment was so connected with the bond as to make the whole transaction a fraudulent transaction.

Before I conclude my observations I will advert very briefly to the evidence which has been adduced on the one side and on the other, with respect to the necessity of the alleged advances, and the mode in which they are stated to have been made. On the part of the bondholder's case there is, in the first place, the affidavit of Mr. Dunlop, in which he swears that, having observed an advertisement in the public journals of the 17th, 19th, and 21st of October, requiring advances on bottomry for the service of the brig Hebe, he wrote to Messrs. Brown & Co., the advertisers, on behalf of his firm, tendering their assistance at twenty per cent. premium, provided the brig would proceed to Manilla, or some other port where she might procure a cargo for England. That a reply was received from Messrs. Brown & Co. accepting the offer; and that advances were accordingly made. This transaction, it is to be noticed, is entirely between Dunlop and the Messrs. Brown, who were at that time the constituted agents of the vessel under the power of attorney from Mr. Alexander, and there

is \*not the slightest suggestion that as between them and [ \*419 ] Mr. Dunlop any collusion whatever existed.

The next affidavit is the affidavit of Thomas Brown; and if this affidavit be credible, and I conceive it to be so in every respect, it not only confirms the statement of Mr. Dunlop to which I have just adverted, but it establishes most conclusively a strong case of necessity for the advance of money on bottomry. The last affidavit to which I shall refer is the affidavit of Mr. Wilson, the clerk of Messrs. Dunlop & Co. This affidavit details at some length the various proceedings connected with the vessel, none of which have any bearing upon the question immediately in issue. As regards the character and conduct of Mr. Dunlop, it is, however, a highly important affidavit; and, in justice to that gentlemen, I think it right to say, that in my judgment it relieves him entirely from the heavy imputations which have been levelled against him in the course of these proceedings.

What is there on the other side in opposition to this evidence? There is an affidavit made by Hampton, the master, which, in my view of it, in no degree militates against the validity of this bond, save as to the intended expenditure. There is also the affidavit of Mr. Alexander, one of the part owners, to which I must advert somewhat in detail. The first observation I would make upon it is, that of the facts which took place at Sydney, Mr. Alexander did not, and could not, know any thing; and the facts at Sydney are the only important facts in the case. Again, with respect to the averment, that in the month of February, 1840, a power of attorney was sent out to Messrs. Brown & Co., authorizing them to receive all freights, and to eject Malcolm from the command, it is perfectly clear, both from the correspondence annexed, \*and from all the evidence [ \*420 ] in the cause, that Messrs. Brown & Co. never did apply to Mr. Dunlop for the payment of any freight which might be due from him; and if this be so, as relates to Mr. Dunlop, this letter and the power of attorney are destitute of all effect in the cause.

It is, however, further averred in this affidavit, that a letter was also sent by Mr. Alexander to Dunlop & Co., informing them that Messrs. Brown were empowered to receive all freights due to the brig; and cautioning Messrs. Dunlop & Co. against paying any more money to Malcolm. This, undoubtedly, is a most important averment; and although I am clearly of opinion that the validity of the bond in question would not be affected by the payment of freight money to Malcolm by Dunlop, even after the receipt of the caution, unless it had been collusive for the purpose of obtaining a bond,—it may be satisfactory, under the circumstances, to examine the statement a little more minutely. And, first, I would observe, that no copy of

this alleged letter to Mr. Dunlop has been produced, nor is its non-production in any manner accounted for. Do Messrs. Alexander and Turcan so conduct their business that they do not retain copies of such important documents? If they do not retain such copies, the fact should have been stated in the affidavit. Again, with respect to the nature of the letter, the court has no certainty of its contents beyond a brief and general abstract furnished by Mr. Alexander himself. Assuming that this letter was actually received by Messrs. Dunlop & Co. before the freight was paid, I should not, in the absence of more specification as to the contents, be justified in concluding that it contained a direction to pay the money to Messrs.

[ \* 421 ] Brown,—more especially as their \* own conduct, and the directions given to them in the letter accompanying the power of attorney, raise a strong presumption to the contrary. I have no legal or satisfactory evidence of the contents of this letter, or of its having been received before the alleged payment of the freight money was made; and it would be contrary to all moral presumption to convict Messrs. Dunlop of fraud upon such a statement, for I cannot dignify it with the name of evidence.

Upon the whole view of the case, I am of opinion, that all necessary ingredients to constitute a bottomry transaction are clearly proved in the present instance. The ship was in debt, and was in need of necessities to quit the port of Sydney and to return home; and I am at a loss to conceive, the agents for the owners having declined to make any advances for her assistance, by what means the money was to be procured, saving upon a bond of bottomry. I must further add, that it would be well if the owners of vessels despatched on these voyages, where every thing must depend upon the integrity of the master, would exercise a little more caution in selecting masters worthy of their confidence, instead of endeavoring to throw the blame of their masters' misconduct upon others, by whose intervention alone they have regained possession of their vessel.

I pronounce for the bond, and with costs.

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The Blenheim. 2 W. Rob.

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THE BLENHEIM.<sup>1</sup>

January 21, 1846.

When a launch is about to take place in a river, reasonable notice of the intended launch should be given; and such notice must be sufficiently specific, with respect to the time when the launch is to take place, as to prevent vessels navigating in the river from unknowingly incurring risk or loss.

It is further necessary that a good look-out should be kept, and great care should be taken to prevent the launch from coming into collision with any other vessel.

A vessel launched from a shipbuilder's yard in the river Tyne, proceeded against for running into a steamer proceeding down the river at the time.

Defence set up that the steamer might have avoided the collision by keeping more to the northward.

Defence sustained by Trinity Masters, and suit dismissed with costs.

THIS was a suit for damage by a collision which occurred under somewhat unusual circumstances.

The case of the plaintiffs alleged, that, in the afternoon of the 31st June last, the steam-vessel The \* Velocity left New- [ \* 422 ] castle, with a general cargo and passengers, bound for Aberdeen. That whilst she was proceeding down the Tyne, and keeping as near as she could with safety to the north shore, The Blenheim was observed on the ways in the building yard of the Middle Dock Company, with flags on board, denoting that she was to be launched during the day. That when The Velocity was approaching the building-yard of the said company, the preventive stays were suddenly cut away and the launch came stern on into The Velocity, striking her with great violence. That although The Velocity was for some time in sight previous to the launch, no notice was given to the persons on board, nor was any signal made, saving the hoisting of the flags on board The Blenheim of the time when the launch was to take place.

The defence was rested upon the following grounds:

First, That the flags hoisted on board The Blenheim conveyed a sufficient indication to all vessels navigating in the river that the launch was about to take place.

Secondly, That it is a well known and long established rule, that the launching of vessels takes place at the time of slack-water; and it was notorious that The Blenheim would be launched at that time upon the day in question.

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<sup>1</sup> [S. C. 4 Notes of Cases, 393.]

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The Blenheim. 2 W. Rob.

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Thirdly, That the steam-vessel, when about 100 yards above the yard, stopped to take a pilot on board; and the pilot on board The Blenheim, seeing her so stop, concluded that she was about to wait until the launch had taken place, and gave orders for the launch to proceed.

Lastly, That the steam-vessel was herself in fault in not [ \*423 ] keeping more to the north shore, there being \*sufficient depth of water to enable her to do so with safety, and that by so doing the collision would have been altogether avoided.

The case was argued by

*Addams* and *R. Phillimore*, for The Velocity.

*Haggard* and *Deane*, for The Blenheim.

The court was assisted by Trinity Masters.

#### JUDGMENT.

DR. LUSHINGTON. Gentlemen, — Although the present case is in some respects distinguished from an ordinary case of collision upon the high seas, there is, I apprehend, no distinction as to the principle by which it is to be decided. The first rule in all cases of the kind is, that reasonable notice of the intended launch should be given before the launch takes place. What such reasonable notice is must depend upon local considerations, as, for instance, the breadth of the river, the number of vessels passing up and down, and other circumstances of the like kind. It is, however, perfectly obvious that such notice must not be a mere general notice that a launch is about to take place upon a particular day; it must be sufficiently specific with respect to time to prevent vessels navigating in the river from incurring unknowingly the risk of loss or injury. Let us now consider how far the notice which is admitted to have given in this case falls within this principle. It is admitted that flags were hoisted, and other indications were made denoting that a launch was to take place upon the day in question; it is also admitted that the ordinary and usual time for launching vessels is at a time when the [ \*424 ] \*tide is slack. On behalf of the promoters of the suit it is contended that this latter circumstance would convey no distinct and definite notice of the actual time when this launch was about to take place, because the time of slack-water is variable and uncertain. It is also further contended, that vessels navigating in the river are not bound to inconvenience themselves by awaiting such uncertainty, and that an actual notice and warning immediately pre-

ceding the launch ought to have been given under the circumstances of the case. Gentlemen,—the first question which you will have to consider is, how far such particular notice might have been given with facility in this case. If you should be of opinion that there would have been no difficulty in so doing, a further consideration will then arise, whether the giving such notice was strictly imperative upon the owners of The Blenheim as a matter of precaution, for the law requires that all legal precaution shall be taken.

In addition to the general precaution to which I have just adverted, the law further requires, on the part of the parties about to launch a vessel, the greatest care and vigilance to prevent the launch from coming into collision with any other vessel. For this purpose it is especially necessary that a good look-out should be kept at the time and immediately before the launch takes place.

The question then arises, whether The Velocity might not have been seen, and the launch delayed until that vessel had passed, if such look-out had been kept upon the present occasion. This is a question of fact, upon which I must now refer you very shortly to those affidavits which have been brought in: I mean the affidavits of M'Leod, Chambers, the pilot, and Rowell, the foreman of the Middle Dock \* Company. It has been argued on behalf of The [ \* 425 ] Blenheim, that Chambers, the pilot, was the person solely intrusted with the care of the launch, and that, as he was solely responsible, his evidence with respect to what he said and did is more especially deserving of consideration. That, according to his statement, he saw The Velocity long before the launch took place, and, seeing her bring up, he naturally entertained the opinion that she was stopping to see the launch, and accordingly gave orders for the launch to proceed. This argument, it appears to me, is not borne out by the affidavits in question.

In the first place, Chambers does not state that he gave any orders at all; he says he saw The Velocity bring up, and supposing she intended to stop until after the launch, "he allowed the proceedings to go on." I need scarcely observe, that this statement is widely different from the averment, that he ordered the launch to proceed. Again, Rowell in his affidavit distinctly states that every thing was done by the orders of M'Leod, and that he ordered the preventive stay to be cut without reference to the pilot. Lastly, M'Leod himself merely says, "that every thing being clear, the preventive stay was sawed," without stating by whose orders this was done; and he goes on to say, (which is an important admission,) that he then for the first time perceived the steam-vessel.

Gentlemen,—It will be for your serious consideration, whether



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The Blenheim. 2 W. Rob.

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M'Leod, in the situation in which he was placed, was not bound under the circumstances to have exercised greater vigilance and circumspection before he gave the order to cut away the preventive stay. If he had used his eyes and looked about him, it is abundantly clear that he must have seen *The Velocity*.

[ \* 426 ] \* I will now bring under your notice some of the points connected with the case of *The Velocity*, the vessel proceeding in the cause. It is urged against her, in the first place, that she is to blame in proceeding at all until the launch was over, inasmuch as the pilot she took on board was cognizant that a launch was about to take place. It cannot, I think, be doubted that the pilot was to a certain extent cognizant of the probability, or even certainty, that a launch would take place. Was he, however, sufficiently cognizant of the precise moment when the event would occur? This will be a point for you, gentlemen, to consider and determine. A second and more important consideration will be, whether *The Velocity*, having so proceeded, conducted herself with the prudence and caution she ought to have exercised. On the part of *The Blenheim* it is suggested, that she ought to have kept her course more to the northward: and that if this course had been adopted, she would have avoided all risk and possibility of collision. On the part of *The Velocity* it is averred on the other hand, that her course was as far to the northward as could be pursued with safety. Which of these two contradictory averments is to be received I must leave entirely to your decision. You are far better acquainted with the river Tyne than myself, and are well able to ascertain the depth of water and the draught of a vessel of the size and tonnage of *The Velocity*: you can therefore judge of the practicability of her going more to the northward as suggested. If the measure was practicable, and the chance of collision would have been obviated by such a course, I have no hesitation in saying that in point of law the master of *The Velocity* was bound to have adopted it, although it might

[ \* 427 ] possibly be accompanied \* by some little inconvenience and delay in the progress of his voyage.

*The Trinity Masters* were of opinion:—

First, That a sufficient notice of the intended launch was to be assumed under the circumstances of the case.

Secondly, that Chambers, the pilot, was justified in concluding that *The Velocity* was intentionally brought up for the purpose of waiting until the launch had taken place.

Thirdly, That there was ample depth of water for *The Velocity* to have gone more to the northward, and that if she had so done the collision would have been avoided.

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The Dante. 2 W. Rob.

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## PER CURIAM.

The opinion of these gentlemen being that The Velocity is herself to blame in not proceeding more to the north, I must dismiss the owners of The Blenheim, and I must condemn the owners of The Velocity in the costs of these proceedings.

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THE DANTE,<sup>1</sup> Stoddart.

January 29, 1846.

A bottomry bond granted in the port of London upon an American vessel, stipulating that the payment of the bond should be made within twenty-four hours after the ship's arrival in a port of the United States.

The vessel sailed from London, took in a cargo at Shields, and was in the actual progress of her voyage, when she was compelled to put into Plymouth, and was condemned as unseaworthy.

Payment of the bond decreed by the court; and the maritime interest allowed, upon the ground that the maritime risk had been partially incurred, and was interrupted by the damaged condition of the vessel.<sup>2</sup>

*Semble*, if the vessel had not left the port of London, the maritime interest would not have been allowed.

In this case the court was moved to pronounce for the validity of a bond of bottomry, and to grant a *primum decretum* for the sale of this vessel, under the following circumstances:—

The affidavit to lead the decree set forth that the vessel belonged to the port of Boston, and was bound on a voyage from the port of London, to proceed forthwith to Shields, and there load a cargo of coke, and forthwith to sail and proceed to the port of Carthagena, \*in Spain, and there to discharge the [ \*428 ] same; and with the first fair wind after such discharge to proceed to some port in the Mediterranean, and there to take on board a cargo of merchandize for a port in the United States. That prior to the departure of the ship from London the master was necessitated to take up the sum of 220*l.*, for the purpose of fitting the vessel for sea, and that the said sum was advanced by T. W.; and upon the 2d of October, 1845, a bond was executed by the master,

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<sup>1</sup> [S. C. 4 Notes of Cases, 408.]

<sup>2</sup> [See the Catherine, 1 Law & Eq. R. 679; The Elephanto, 9 Law & Eq. R. 553; Pope v. Nickerson, 3 Story, R. 465.]

stipulating for the repayment of the money, together with a maritime interest of 15 per cent., within twenty-four hours after the arrival of the vessel at a port in the United States. That the vessel left the port of London and proceeded to Shields, and there took in a cargo of coal and coke, and proceeded thence bound to Carthagen; but in the progress of her voyage she sustained considerable damage at sea, and arrived at Plymouth in a sinking state. That the vessel has been examined by the surveyor appointed for Lloyd's at the port of Plymouth, and also by J. M., shipowner and surveyor at the same port, and has been pronounced totally unfit to proceed to sea. That payment of the money advanced had been demanded of the master of the said ship, but without effect, and that the said T. W. cannot recover the same without the aid of the court.

PER CURIAM.

The affidavit of the bondholder in this case states, that the vessel is now lying unseaworthy at Plymouth, and is unable to proceed to her port of destination. The first question which arises is, can I enforce a bond which is made payable only upon the arrival of the vessel at a port of the United States? I am not aware of [ \* 429 ] \* any case in which this point has been directly decided; but looking to the general principles which govern this class of cases, I am of opinion that I am bound to pronounce in favor of the bond, and for this reason, that when money has been advanced on bottomry, and the completion of the voyage is prevented by the act of the master, or by some impossibility which the bondholder cannot control, it would be repugnant to all justice that his interest should be prejudiced by converting his security under a bond of bottomry into a debt upon personal credit. Another question arises with respect to the maritime interest of 15 per cent., which is stipulated to be paid in this bond. It is obvious that the whole risk and hazard of the voyage which was originally contemplated has not been incurred. If no risk whatever had been incurred, as in the case of a vessel never leaving port, I should have felt no hesitation in holding that no maritime interest was due. In the present case, however, part of that risk has been encountered in the voyage from London to Shields, and from thence to Plymouth. Under the peculiar circumstances of the case, therefore, and considering that the further risk has been interrupted by the damaged condition of the ship, I shall not sever the interest, but shall pronounce for the bond and make the decree as prayed.

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The Ocean. 2 W. Rob.

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## THE OCEAN, Ward.

February 5, 1846.

Validity of a bottomry bond contested upon the grounds : —

1st. That there was no necessity for a bond of bottomry ;

2dly. That the bond was vitiated *personali exceptione* of the lender ;

3dly. That some of the items in the bond consisted of simple contract debts, bought up from the ship's creditors, at a discount of about fifty per cent.

Bond generally referred to the registrar and merchants, to report thereon.

THIS was a question as to the validity of two bonds of bottomry, executed by the master of this vessel. The first bond was executed at Sydney, for the sum of \*830*l.*, with a maritime [ \*430 ] premium of thirty-five per cent. The second bond was given at Pernambuco, for the sum of 59*l.*, upon the same rate of premium.

The bonds were opposed by the mortgagee of the ship upon the following grounds :

With respect to the Sydney bond, it was contended : 1st. That the mortgagee was ready and willing to defray all the disbursements necessary to enable the vessel to return to this country ; 2dly. That the lender of the money, who had taken upon himself the concerns of the vessel, might, if he had used due diligence, have received on account of the freight and passage money upon the homeward voyage sufficient funds to discharge the liabilities of the ship, without having recourse to a bond of bottomry. A further objection to this bond was also taken, namely, that certain items included in the bond consisted of debts bought up by the bondholder, at fifty per cent. discount ; and that his conduct in the whole transaction amounted to what is, in the civil law, termed a *personalis exceptio*, which debarred him from his title to sue as bondholder in the case.

The second bond, executed at Pernambuco, was opposed upon the ground that the bondholder, who had taken his homeward passage in the vessel, had not paid his passage money previous to the departure of the vessel from Sydney, and was a debtor to the vessel in the amount of that passage money when the second advance of money was made.

The case was argued by

*Addams* and *Robinson*, for the bondholder.

*Harding*, *contra*.

[ \* 431 ] \* JUDGMENT.

DR. LUSHINGTON. The question to be determined in this case respects the validity of two bottomry bonds, which are put in suit by Mr. Richard Hall, and are opposed by the mortgagee of the vessel. The first bond is dated 3d February, 1844, and is for the sum of 830*l.*, with interest at thirty-five per cent. This bond is contested upon two grounds: 1st. That there was no necessity, nor indeed any agreement, for a bond of bottomry; 2d. That the bond is vitiated *personali exceptione*, as it is termed in the civil law; in other words, by the personal misconduct of the lender. It is not denied, in the defence, that some advances were required to enable the vessel to clear out from Sydney and return to this country; but it is contended that such advances did not exceed the sum of 1,000*l.*, and might have been procured without a recourse to a bond of bottomry. The first point, then, in the inquiry is, from what quarter, and upon what security, were these advances to be obtained? Certainly not upon the personal credit of the master, for he clearly had none at all; the master having been sent to Sydney, as far as it appears, without any consignee or agent, and having been compelled to remain there, to the great detriment of all parties having any interest in the vessel, for a period of fourteen months. It is equally clear that it was not upon the credit of the owners; because intelligence of the owners' bankruptcy had reached Sydney in November, 1843. Looking to the answer to the act on petition, I find two sources of supply are suggested. In the first place, it is said that the money might have been obtained upon the security of the mortgagee; in the next place, that the funds derivable from passage money and freight, paid at Sydney before the ship quitted

[ \* 432 ] the \* port, would or might have been amply sufficient for her necessities. That Mr. Hayley would have been willing to have honored any bills drawn upon him for the necessary service of the ship may be taken as an admitted fact, but the mere averment of this fact is not sufficient. The true question is, was the master authorized to draw such bills? and would any person at Sydney have cashed these bills, or advanced the money upon them? In order to ascertain this point, I must look at the affirmative evidence in the first instance, and I will begin with the affidavit of the master. His statement must, I conceive, be received with no small degree of caution; and for this reason, that his evidence affirming the existence of these alleged resources is utterly inconsistent with his own conduct in signing the bond, and is equally at variance with an honest discharge of his duty towards his employers. One of the main averments in the bond is the total deficiency of personal credit,

and the absence of other available resources; and to this averment he has affixed his seal. Again, if he had the power of procuring funds on personal credit without bottomry, or of realizing the funds to which I have referred, namely, the passage money and freight, it was his duty to have done so.

Having said thus much upon the general credit of this witness, I will now proceed to examine his evidence in detail. He states that in January, 1844, he received from Rowland, M'Nab & Co. a letter, dated in September, 1843. That letter is written to him, not by the owner, but by Mr. Hayley; and the important part of it is to this effect:—"Supposing that you would have spent all your funds by this unlooked-for circumstance, I have written to a house in Sydney to do all the needful for you, so as to make you comfortable in \*your funds; but use all despatch, diligence, and economy, and get the best price you can for the fittings up." [\* 433]

"The house in Sydney" here mentioned, obviously refers to the house of Rowland, M'Nab & Co.; and the question then arises, did the master proceed to act upon this letter, as it was his bounden duty to have done? and did Rowland, M'Nab & Co. interfere in the ship's concerns? Upon the first point, strange as it may appear, the master is wholly silent; and his silence is the more remarkable, because in a subsequent part of his affidavit he distinctly swears that Rowland, M'Nab & Co. were willing to advance the money, and that Mr. Hall knew it,—a startling averment, which, if true, would at once be destructive of the bond in question, for no man can advance money on bottomry when other persons are willing to advance it upon personal security. The truth of a fact like this, I must say, requires a little further examination; and the observation immediately occurs, if Rowland, M'Nab & Co. would have advanced the money, why did they not do so? and why did the ship remain at Sydney a whole twelvemonth after this communication had been received? Against this statement, on the other hand, is the averment alleged by Mr. Hall, that Rowland, M'Nab & Co. would not interfere at all, and that they declined to do so, upon the ground that they were interested in some portions of the cargo, which had been sold at Rio Janeiro. Under the circumstances I consider it impossible, upon such evidence as this, to come to the conclusion that Rowland, M'Nab & Co. would have advanced the money on personal credit.

The master further swears, in his affidavit, that he was informed by Mr. Rostrom, and also by Mr. Hall, who was then his clerk, that Mr. Rostrom had received \*a letter from Mr. [\* 434] Hayley, stating that he was ready to discharge all neces-



sary disbursements on account of the ship. Be it so. How does this advance the defendant's case? It only proves what is apparent throughout the whole of the case, that Mr. Hayley was willing to make the necessary disbursements for the ship, and was most anxious to hasten her return home. It does not tend to establish the real point in the case to which I have already adverted, namely, that any person was willing to make the advances at Sydney.

I now come to the affidavit of Mr. Hayley; and, first, with respect to the power of attorney which that gentleman forwarded to Mr. Eccleston, with the view of protecting the interests of the ship. Mr. Hayley himself admits that, as a means of establishing credit, it was altogether ineffective. Mr. Hayley, however, in his affidavit swears, that he believes Deloitte & Co. would have made the advances if the ship had not been taken out of their hands by Mr. Hall. If this fact were satisfactorily proved, it would be of great importance in the cause; but what is the proof by which it is to be established? There is no affidavit from Deloitte & Co., neither is there any evidence from the master to this effect. The averment rests entirely upon the assertion of Mr. Hayley's belief that the fact was so; Mr. Hayley being resident at Liverpool, where he could possibly know nothing about the matter. In point of fact, the assertion of Mr. Hayley amounts to a mere inference, drawn by himself from the circumstances of the case; an inference which, I need scarcely say, it is wholly impossible that this court can receive as evidence

in a matter of this description. With respect to the first [ \* 435 ] objection, then, which has been taken in exception to \* this bond, namely, that there were persons at Sydney ready to make the advances upon personal security; I must come to the determination that the proofs in the cause altogether fail. The probabilities of the case are also strongly against it; and, in considering these probabilities, it is not to be forgotten that Mr. Hayley had himself dishonored a bill drawn upon him by the master, and that this was known at Sydney. Although such bill might have been properly dishonored, yet the mercantile men at Sydney might not have been disposed minutely to consider the reasons. They would be more inclined to act upon the fact itself.

The second averment upon this part of the case is, that sufficient funds would or might have been procured from the passage and freight money received at Sydney without resorting to a bond of bottomry; but before I proceed to express my opinion as to the mode in which this averment should be disposed of, I think it expedient to consider the second ground upon which the bond is contested, namely, that the bond is vitiated by the personal misconduct of the lender.

In the first place, let me examine how did Mr. Hall stand in relation to this ship? He had been clerk to Mr. Rostrom, who had been appointed by the master agent for the ship. From his situation, and indeed from all the facts and evidence in the case, he must be assumed to have been fully cognizant of all the circumstances relating to the ship. He must have known of all the letters written by Mr. Hayley, so far as they came to the knowledge of Mr. Rostrom, his principal; he must also have known of Mr. Hayley's readiness to make the necessary disbursements for the vessel. Conceding that all this was known to the fullest extent, would the knowledge of these facts \*debar Mr. Hall from the right to take a bottomry bond upon any advances made by him for the service of the ship? I conceive not; and for this reason, that he was not bound to advance his money upon the personal credit of Mr. Hayley; and there is no evidence whatever to show that any one else would have advanced the money upon such security. But it is said, that upon the bankruptcy of Mr. Rostrom, his connection with the ship ceased, and that Deloitte & Co. took charge of her, and according to the sworn belief of Mr. Hayley, they were ready to make the advances upon his personal credit. If this be true, here was a mercantile house in charge of the vessel in the month of October, 1843, the necessary advances were provided, and the master willing and desirous to discharge his duty to his employer, the chief part of that duty being to keep down as much as possible the expenses of the ship; yet in that same month, Mr. Hall is employed to manage all the concerns of the ship, or, in other words, to do what Deloitte & Co. and the master ought to have done without the interference of Mr. Hall or any other person. I have already observed, that in support of this averment there is not a scintilla of evidence from Deloitte & Co., who might have placed the question beyond all doubt. Looking at all the *res gestæ* upon this part of the transaction, I confess that I am unable for a single moment to reconcile Mr. Hall's appointment with the fact that the vessel was really and truly in charge of Messrs. Deloitte & Co. It is painful for the court to notice the frequent recurrence of cases in which masters of most valuable ships are sent upon these distant voyages without even a recommendation to any house of responsibility,—the consequence is, that the masters detain the vessels, to the infinite injury of all \*concerned; and [ \*437 ] then come back with bottomry bonds, upon which it is impossible to obtain any correct information, and which bonds, whether valid or not, in the great majority of instances show that the masters have betrayed the interests committed to their charge.

I observed, in a recent case which was before me,<sup>1</sup> and I now repeat the observation, that it is highly incumbent upon the owners of vessels to exercise much greater caution in the selection of masters upon whose credit and good character they can rely. Assuming that Mr. Hall was duly authorized by the master to collect the debts and to manage the concerns of the ship, what is the next step in the case? Why, I find Mr. Hall buying up from the creditors some of their debts at about fifty per cent. discount. It is quite clear, that if this bond should be ultimately pronounced for, these debts can form no part of the sum recovered upon the bond. If these debts were *bonâ fide* debts, they were debts originally contracted upon personal credit. The creditors could only sell them as such; and Mr. Hall, who stands in the creditors' shoes, can no more convert them into a lien upon the ship, to be covered by a bond of bottomry, than he could if he had originally made the advances himself upon personal security. The law of this court, as clearly laid down by Lord Stowell in the case of *The Augusta*, distinctly shows that such conversion cannot be legally effected. The objection to these claims, therefore, appears to me to be clearly valid; at the same time, they will not necessarily vitiate the whole of this bond. If part of a bond be deducted as invalid, the whole bond does not fail; it may be good in part, and bad [ \* 438 ] in part. In following \* up the inquiry into this part of the case, I must now advert to two or three of the documents in the cause, which were much commented upon in the argument, and which, I confess, made a very strong impression upon the mind of the court. A letter dated "Sydney, 1st December, 1843," is annexed to the affidavit of Mr. Hayley, and this letter purports to be from Mr. Rostrom, and bears his signature, but is admitted to be in the handwriting of Mr. Hall himself. The contents of this letter are to the following effect:

"DEAR SIR,

Your favor, per Clara, was duly received, but I beg most distinctly to deny that I have been the means of *The Ocean* being detained here. The facts are simply these: On her arrival here she was put into my hands, and as soon as possible I proceeded to get her ready for Batavia. Messrs. M'Nab & Co., Eccleston & Hirst, and other claimants, (whose opinions were confirmed by the first lawyers here, namely, Carr, Rogers, and Owen,) immediately took steps to prevent her proceeding to sea. To sea, therefore, she did not go,

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<sup>1</sup> *The Hebe*, *supra*, p. 421.

and at the present time she is in the harbor. By dint of persuasion, and in consequence of the lawyers having changed their opinion, I have hopes that she will proceed almost immediately. I need not say that many of the hands were discharged a long time ago, and that the greatest economy has been exercised during her stay here. To whom to write I did not know. I trust, however, that she will make something handsome at home — and freights appear to be generally good at Batavia, — if I cannot get her ready soon for London. My next communication will be to inform you either that she has sailed, or that she has been sold by order of the Court of \*Admiralty. It will depend upon what terms can be made [ \* 439 ] for a bottomry bond; twenty-five per cent. has been charged in good times, but as things are now so bad I can scarcely say what it will be done at; perhaps thirty-five or forty per cent. I will, however, do my best to promote your interests; and remain, very respectfully,

JNO. ROSTROM."

Considering that the gentleman who thus proffers his services had been a bankrupt two months before, and that the vessel, according to the evidence, had been taken out of his hands, and intrusted to the charge of other people, I must say that the contents of this letter are somewhat startling. It predicts, in December, the bottomry bond of the 3d of February and the thirty-five per cent. premium, with a power of anticipation I could hardly suppose him to have possessed if he had nothing to do with it, and the ship was out of his hands.

Another letter, equally unintelligible to me, is a letter dated 26th June, and addressed to Mr. Hayley at Liverpool. It is in these words:

"SIR,

"The Ocean having arrived, may I request to see you in town at your earliest convenience? Captain Ward will give you my address, should you decide upon coming; but if not, please to address me to the care of C. J. Metcalfe, Esq., Military Department, India House; and let me know what you wish done. I was in the office of Mr. Rostrom, at Sydney, and write this as one of his clerks.

"Yours respectfully J. HALL."

From this letter it appears, that it was not written by Mr. Hall in the character of bondholder, but in the capacity of clerk to Mr. Rostrom; and for what \*purpose this was added it is [ \* 440 ] utterly impossible for me to devise. Coupling it with the other letters, it tends to show that the correspondence has not been conducted in the most direct and intelligible manner. There is also

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The New Eagle. 2 W. Rob.

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another document said to be in Mr. Hall's handwriting, namely, the draft of a letter, as I understand, signed by the master, and sent to Mr. Hayley, in which he speaks of advertising for a bond of bottomry ; but there is no evidence of any advertisement whatever. Upon the whole view of this case I must say, that the entire transaction is surrounded with circumstances of great suspicion. At the same time I am not disposed to hold that these circumstances, suspicious as they are, are sufficient to induce me at once to dismiss this suit. I shall refer the case to the registrar and merchants for the purpose of considering generally the whole of these accounts, and of reporting specifically what balance was due to Mr. Hall upon which a bond of bottomry could be legally taken. This reference will at once dispose of the point I reserved for consideration, namely, whether Mr. Hall received from the freight and passage money before the ship left Sydney, sufficient funds to meet the necessities of the ship without resorting to a bottomry bond.

The other bond, which was executed by the master at Pernambuco, I shall in like manner refer to the registrar and merchants ; and I shall reserve my final decision until the registrar and merchants have made their report to the court.

[ \* 441 ]

\* THE NEW EAGLE.<sup>1</sup>*Motion.*

February 5, 1846.

A simple contract creditor not permitted to have his asserted debt paid out of the proceeds of a ship which had been found derelict, and had been sold under the decree of the court, the application being resisted by the mortgagees of the vessel, who claimed the proceeds in question in satisfaction of their mortgage.

Proceeds directed to be paid out to the mortgagees.

IN this case the vessel was found derelict off Flamborough Head, and was taken by the salvors into Bridlington, where she was arrested in a cause of salvage and was sold under a decree of the court. The proceeds of the sale were brought into the registry, and the court decreed a moiety of the net proceeds to the salvors. An application

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<sup>1</sup> [S. C. 4 Notes of Cases, 426.]

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The Eden. 2 W. Rob.

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was now made on behalf of the mortgagees of the vessel, that the remaining moiety of the proceeds should be paid out to them. This application was opposed on behalf of an asserted creditor, who alleged that he had advanced 66% for the service of the vessel in the payment of seamen's wages, board, &c.

*Deane*, for the mortgagees.

*Phillimore*, for the creditor.

PER CURIAM.

When I first read the affidavits on which this motion was to be founded, I felt a strong inclination to support the claim which has been made by Mr. Brambles, the alleged creditor, so far as the law would allow me. I regret to find that the principles of law which are applied in these courts prevent me from affording him any assistance. I must be guided by the decision of the Privy Council in the case of *The Neptune*, reported in 3 Knapp, p. 94; and after that decision it is impossible to make a distinction between the proceeds and the ship itself. I must, therefore, reject the claim of Mr. Brambles, and direct the remaining moiety of the proceeds to be paid to the mortgagees upon the production of their deed of mortgage.

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\* THE EDEN,<sup>1</sup> Parsons.

[ \* 442 ]

March 4, 1846.

Construction of the Cork Harbor Pilot Act, 1 Geo. IV. c. 52, s. 33.

*Seemle*, the General Pilot Act, 6 Geo. IV. c. 125, is confined to England, and was never intended to apply to Ireland at all.

Owners of a damaging vessel running into another vessel in Cork Harbor condemned in the damage, the pilot in charge not being taken by compulsion.<sup>2</sup>

In this case an action was brought by the owners of *The Welcome Return* against this vessel, for damage by collision in Cork harbor; both vessels at the time beating out of the harbor, and both being upon the starboard tack. The case was argued upon the merits

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<sup>1</sup> [S. C. 4 Notes of Cases, 460.]

<sup>2</sup> [*The Batavier*, 2 W. Rob. 407.]



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The Eden. 2 W. Rob.

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before Trinity Masters, and they pronounced that The Eden was to blame. When the court delivered its judgment a question was reserved for further argument, how far the owners of The Eden were exempt from responsibility, upon the ground that a duly licensed pilot was on board and in charge of The Eden at the time of the collision, and that such pilot was taken on board under the provisions of an act of parliament, 1 Geo. IV. c. 52, s. 33.

In support of the owners' exemption from liability

*Addams* and *Robinson* contended, that the words of the 33d section, "no person shall offer himself as a pilot, or take charge of any vessel arriving or sailing from the harbor of Cork, saving such persons as shall be appointed for the purpose by the commissioners under the statute," amounted to a positive injunction upon all masters entering and quitting the harbor to put their vessels in charge of a pilot, and that the penalty of 10*l.*, specified in the act, extended to them if they presumed to navigate their own vessels. That although there was no proviso in the act itself expressly exempting from liability the owners of vessels having such pilot on board, the penalty of 10*l.* would make the taking the pilot an act of compulsion on the part of the master, and the owner would consequently be relieved from responsibility, under the principles laid down in the courts of common law [ \*443 ] \* in the cases of *Milligan v. Wedge*,<sup>1</sup> *Lucey v. Ingram*,<sup>2</sup> and that of *Carruthers v. Sydebottom*.<sup>3</sup> That if the local act 1 Geo. IV. c. 52, was insufficient *per se* to protect the owners of The Eden, the Cork Harbor Act was to be taken in conjunction with the General Pilot Act; and under the decision in *Carruthers v. Sydebottom* the owners' responsibility was taken away.

*Phillimore* and *Bayford*, *contra*. That the words of the 33d section, which have been referred to, were not intended to apply to the masters of vessels navigating their own vessels as suggested, but were exclusively confined to persons volunteering their services as pilots, without being duly licensed by the harbor commissioners. The 10*l.* penalty was confined to these parties alone; and that even in case the master of a vessel entering or quitting the harbor should think fit to employ such unlicensed person, the master himself would not be affected by the penalty; *à fortiori*, no such result would ensue if he choose to navigate his own ship. That the act of taking a pilot being voluntary, the principles in the common law cases which had

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<sup>1</sup> [12 Ad. & Ellis, 737.]

<sup>2</sup> [6 Mees. & W. 302.]

<sup>3</sup> [4 Maule & S. 77.]

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been cited did not apply. That the attempt to connect the Cork Harbor Act with the General Pilot Act could not be sustained, because the provisions of the General Pilot Act did not extend to Ireland, but was confined to England alone. Lastly, that the true principle upon which the point in issue depended had been laid down in a court of common law in the case of *Martin v. Temperley*, reported in 4 Adolphus & Ellis. That there was a strong analogy between the circumstances of that case and the present case, and that the decision delivered by the Court of \*Queen's Bench in [ \*444 ] that case was an authority of the highest weight, and was conclusive of the question involved in this discussion.

#### JUDGMENT.

DR. LUSHINGTON. When the court pronounced its judgment in this case, that *The Eden* was to blame, and that no misconduct was imputable to *The Welcome Return*, a question was reserved for further consideration,—how far the owners of *The Eden* were relieved from responsibility under the provisions of the Pilot Act, the collision having occurred in the harbor of Cork, and *The Eden* being at the time in charge of a pilot duly licensed to act as pilot in that locality. This question I have now to determine; and looking to the difficulties which have heretofore been experienced, and to the conflicting decisions which have been delivered in other courts, I am glad that I have taken time to deliberate upon the subject, although perhaps my own original impression has not been changed by the arguments which have been urged in the present instance. It is not unimportant to the consideration in question to bear in mind the view which Lord Stowell entertained in the case of *The Neptune the Second*, a case which is reported in the first volume of Dodson's Reports, page 467. The decision in that case was wholly independent of any reference to legislative enactments. From my own recollection of that case I am satisfied that no allusion was made to any act of parliament, and in delivering his judgment, Lord Stowell declared in most explicit terms, that the owners of vessels were responsible to the injured parties for the misconduct of pilots taken on board. It may be asked who were the pilots of whom Lord \*Stow- [ \*445 ] ell was speaking? Clearly not the persons of whom in earlier times the class of pilots consisted: namely, a body of persons not appropriated to the local navigation of vessels by any competent authority, but persons promiscuously plying about in the neighborhood of ports and channels and taken on board by the masters at their own option, for the purpose of conducting their vessels where a local knowledge and experience was required. Long previous to the

time when Lord Stowell delivered his judgment in *The Neptune the Second* pilots had been incorporated by charter, and their duties and privileges regulated by acts of parliament. As early as the reign of George the First there were statutes for the regulation of pilots, relating more especially to those who navigate on the river Thames. These acts of parliament, it must be assumed, were not unknown to the very learned judge who decided the case of *The Neptune the Second*; and in his decision in that case Lord Stowell must be understood to assert, that by the common law of the Court of Admiralty, independent of all statutory enactments, the having on board a pilot duly licensed and authorized to act as pilot, did not exempt the owners from a responsibility for the acts of that pilot.

The opinion thus expressed by that very eminent judge was not only his own individual opinion, but was obviously the received opinion of this court from the earliest periods; for surely it is not assuming too much to say, that, if the fact had been otherwise, cases would have occurred and decisions would have been found where the contrary doctrine had been established, namely, that the owners were exempt from responsibility upon the mere fact that a licensed pilot was on board. Without referring to other authorities in this court [ \*446 ] \* upon the point, I may here observe, that the same opinion has been entertained at least once in the courts of common law, in the case of the *Attorney-General v. Case*,<sup>1</sup> where the Court of Exchequer held that the owners of the vessel were liable, although the vessel was in charge of a duly licensed pilot. The judgment in that case was rested upon the assumption, that the pilot was taken on board not by compulsion but voluntarily, and, as far as I am informed, the same principle has been adopted in all cases where the taking the pilot was not compulsory, or where the liability was not taken away by act of parliament, as in the case of *Lucy v. Ingram*.<sup>2</sup> How far, then, does this principle apply to the present case? If I am to hold that the Cork Local Act comprises the whole statutory law which is applicable to the case, I can entertain no doubt that there was no compulsion upon the owners of this vessel to take a pilot, and that there is no legislative enactment which takes from such owners the responsibility for the consequences of this collision. The two sections of this act, which it is admitted are the only sections which have any reference upon the point in issue, are the 32d and 33d sections. The 32d section, after reciting that divers accidents had happened from the incompetency of persons taking charge of

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<sup>1</sup> [3 Price, 802.]<sup>2</sup> [6 Mees. & W. 302.]

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The Eden. 2 W. Rob.

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vessels as pilots, gives power to the commissioners of the harbor to license a certain number of persons during their will and pleasure to act as pilots. The 33d section enacts, that after a certain period subsequent to the passing of the act, no person should offer himself and take charge of a vessel as pilot, unless he be so licensed, under a penalty of 10*l*. There is also a further proviso, that if the person not duly licensed who should take charge of any vessel arriving at the \* harbor or port of Cork should, upon the arrival of the [ \*447 ] vessel within the headlands of the harbor, or as soon after as any person nominated and appointed by the commissioners should offer himself, deliver up the charge of the vessel to the pilot so offering himself, then in such case such unlicensed person should not be liable to any penalty. Referring to these two sections, it is obvious that this statute leaves the masters of vessels at full liberty to navigate their own vessels without taking any pilot at all; nay, further, it imposes no penalty upon them if they take an unlicensed pilot. The penalty or compulsion, if I may use the expression, is upon other persons: namely, the persons who should act as pilots without being duly licensed. Thus far there is no difficulty in the consideration of the present question; but another view of the case has been suggested by the counsel in their argument, from which it is my duty not to shrink, namely, that under the authority of the decision in the case of *Carruthers v. Sydebottom*,<sup>1</sup> the Cork Local Act must be taken in conjunction with the General Pilot Act, and that by virtue of that decision the responsibility of the owners of *The Eden* is taken away. Against this view of the question there are, in my opinion, three very strong objections. First, that the decision of the Court of Queen's Bench, in the case of *Carruthers v. Sydebottom*, is not reconcilable with the opinion of the Court of Exchequer in the case of the *Attorney-General v. Case*,<sup>2</sup> and it has been so stated by Lord Tenterden in his book on shipping. Secondly, that both these decisions apply to the preceding Pilot Act, 52 Geo. III. c. 39, and not to the 6 Geo. IV. c. 125, although it must be admitted that the two acts very closely resemble each other. Thirdly, (and this, perhaps, is the most important distinction of all,) \* the question at [ \*448 ] issue in this case does not relate to a pilot taken on board on the coast of England, but in a harbor of Ireland. The only section in the act, 6 Geo. IV., which was cited by the counsel for *The Eden* was the 72d section, and it is evident that this section alone could never help me to a right conclusion upon the point in issue.

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<sup>1</sup> [4 Maule & Sel. 77.]<sup>2</sup> [3 Price, 302.]

It was necessary that I should look through the whole statute, and I have done so, in order to see whether it was the intention of the legislature to render the act applicable to every pilot throughout the whole kingdom of Great Britain and Ireland. The whole of the statute, it appears to me, negatives the proposition that it was ever intended to apply to Ireland at all. When I look at the statute what do I find in the 5th section? I find this provision, — “Be it further enacted, that it shall be lawful for the Corporation of Trinity House, Deptford Strond, and they are hereby required, to appoint from time to time, as often and for such period as they in their discretion shall think fit, proper and competent persons at such port or places in England as they shall think requisite, except where there are local acts, with which they are not to interfere.” The very outset of the act, therefore, shows that it could contemplate England, and England alone. If it were necessary I might refer to other passages in the act which have all the same bearing; as, for instance, all the bye-laws are to be sanctioned by the chief justice of the King’s Bench in England, and in many cases applications are to be made to the quarter sessions. There are no words which refer to an Irish court under any circumstances whatever, and all these provisions would be a mass of absurdity if this act were meant to extend to Ireland.

Under the circumstances of the case, therefore, having  
[ \* 449 ] \* considered the act of parliament to the best of my ability,

I come to the conclusion that the General Pilot Act does not apply in the present instance. If this be so, the owners of The Eden must be responsible, unless the whole of the law heretofore sanctioned by high authority is to be overruled. This I am asked to do upon the single authority of the case of *Milligan v. Wedge*,<sup>1</sup> in which case it is said the general principle has been laid down which must rule in all other cases. On the other hand, the authority of the decision in *Martin v. Temperley*<sup>2</sup> was strongly urged upon me. I do not think it necessary to enter upon a minute discussion of these two cases. I dare not be the first to break down the old and well-recognized principle, that the owners of vessels are liable whenever they take a pilot without compulsion, or are not relieved from responsibility by act of parliament; to this rule I am bound to adhere, and I think that I have no discretion to depart from it, however strong the analogy may be to other cases and other matters decided in the courts of common law. I wish it to be distinctly understood, that I do not presume to give any opinion upon these cases, and if the principles which have

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<sup>1</sup> [12 Add. & Ell. 737.]

<sup>2</sup> [4 Add. & Ell. N. S. 298.]

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The Chieftain. 2 W. Rob.

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governed them be applicable to cases like the present, they must be applied by a higher authority than mine. I am of opinion that the pilot in this case having been taken on board by compulsion, the owners of The Eden are responsible for the damage in question, and I do not see that they are relieved from that responsibility by any act of parliament. With respect to the costs, the owners of The Eden must pay the costs of the original hearing, and, with respect to the point of law which has been now raised, each party must pay their own costs.

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\* THE CHIEFTAIN.<sup>1</sup>

[ \* 440 ]

*Motion.*

March 4, 1846.

Salvage service performed to a British ship by one of her Majesty's cruisers on the coast of Africa.

Bill for 400*l.* as salvage remuneration drawn by the master upon the owners in England in favor of the salvors.

In the course of the homeward voyage the vessel founders, and the bill upon presentation is refused payment by the owners.

Monition against the owners refused by the court.

In this case the vessel was stranded upon the coast of Africa, where she was fallen in with by her Majesty's steam-vessel The Thunderer. With the assistance of the crew of The Thunderer the vessel was unladen and repaired; and prior to her departure on her homeward voyage, the master of The Chieftain drew a bill upon the owners in England for 400*l.* as a salvage remuneration to the officers and crew of The Thunderer for their services. In the course of her voyage home The Chieftain foundered off St. George's Island, and the bill upon presentation to the owners was refused payment.

The *Queen's Advocate* now moved the court to decree a monition against the owners of The Chieftain, to show cause why the 400*l.* should not be paid to the officers and crew of The Thunderer.

PER CURIAM.

My difficulty in acceding to this motion arises from the fact that

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<sup>1</sup> [S. C. 4 Notes of Cases, 459.]



the property to which the alleged services were rendered is actually lost and gone. I am not aware of any case in which a monition to show cause has issued against the owners of property which has been lost; and I feel that in granting such monition in the present instance I should convert the jurisdiction of this court from a proceeding *in rem* to a proceeding *in personam*. I must, under the peculiar circumstances of the case, refuse the monition as prayed.

[ \* 451 ]

\* THE SARACEN.<sup>1</sup>

March 25, 1846.

Owners of a damaged vessel and part of the cargo, who had obtained a decree of the court in a cause of damage, entitled to have the proceeds of the damaging vessel paid out of the registry to satisfy the amount of their damage, in preference to the owners of the remaining portion of the cargo, who had not brought their action until after the decree of the first suit had been pronounced.

Prayer of the owners of the remaining portion of the cargo, that the proceeds might be applied *pro rata* to satisfy the two actions, rejected.

[Any agreement of proctors, as to distribution, not to affect the case.]<sup>2</sup>

In this case a suit was promoted against this vessel by the owners of the brig Diligent, and by the owners of part of the cargo on board, for damage by collision, whereby the brig and the entire cargo on board were sunk and lost.

A separate action was at the same time entered on behalf of the owners of the remaining portion of the cargo, but this action was not further prosecuted. Upon the 6th of May, 1845, the original action came on for hearing, and the court, assisted by Trinity Masters, pronounced for the damage in question with costs, referring the amount to the registrar and merchants. Upon the same day when the sentence was pronounced, and subsequent to the hearing of the original cause, a second action was entered by the owners of the remaining portion of the cargo in the sum of 2,500*l.*, and the action proceeded in the usual form by default.

The vessel having been sold under a decree of the court, the proceeds of the sale, amounting to the sum of 1,037*l.* 15*s.* 6*d.*, were brought in

<sup>1</sup> [S. C. 4 Notes of Cases, 498. Affirmed on appeal, 6 Moore, P. C. R., 56.]

<sup>2</sup> [The Mellona, 3 W. Rob. 25.]

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The Saracen. 2 W. Rob.

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upon the 24th of June: and upon the 4th of November the proctor for the original promoters prayed these proceeds to be paid out of the registry to his parties. This prayer was opposed by the proctor for the owners of the remaining portion of the cargo, who prayed to be heard upon his act on petition.

An act on petition was accordingly brought in, setting forth in substance, that the non-prosecution of the original suit by the owners of the remaining portion of the cargo was occasioned by a private understanding with the proctor for the original promoters of \* the suit — that their interests were identical, and that the [ \*452 ] results of the original proceeding would be equally beneficial to both parties. That subsequent to the decision a proposal was made to the proctor of the original promoters, that the proceeds of the sale of the vessel should be paid out to him for an equitable division amongst the owners of the brig and the owners of the cargo in proportion to their respective losses; and that this proposal was acceded to, and was in the progress of being carried into effect.

This statement was expressly contradicted in the reply; and upon the 26th of January the question was argued, when the court took time to consider its judgment.

#### JUDGMENT.

DR. LUSHINGTON. The learned judge, having fully adverted to the proceedings in the case as detailed above, proceeded to observe to the following effect: —

The question which I have to determine is, whether a suitor in this court, having obtained a decree in a cause of this description, is to be curtailed of the benefit of that decree by a distribution of the proceeds in favor of claimants who have not proceeded to enforce their claims until the decree was made, or who have commenced their proceedings upon the very same day. Let me consider how the question would stand in analogy to the principle and practice of other courts. The class of actions which approximate most nearly to the present case are the cases of creditors proceeding to recover their claims from the executors of a deceased testator. Although such actions are personal in point of form, in substance they may be considered as proceedings *in rem*; for if the creditor succeeds in his suit, he is to be paid out of the \* assets of the testator, and not, in ordinary cases [ \*453 ] at least, out of the property belonging to the executors themselves. The law upon this point, so far as it is necessary to examine it for the elucidation of this case, is to be found in Williams' Treatise on Executors. It is not my intention to go through the whole law as it is there laid down; it is sufficient to observe that the

law as stated in the 5th section clearly favors those who are most active in seeking its aid and assistance. After enumerating a variety of claims which are entitled to priority of payment, the learned author distinctly lays it down, that amongst creditors of equal degree the creditor who first obtains judgment must be paid in preference to all others of the same degree; that in order to insure an equal distribution of the estate, a bill must be filed on behalf of all the creditors; and unless this be done, not only may an individual creditor obtain a preference by his greater diligence, but even a court of equity will not interfere to prevent a preference by an executor confessing a judgment.

I will now examine whether there be any distinction in principle between the present case and the cases to which I have referred. The vessel has been sold under a decree of this court, and the party who has obtained the judgment will, as I understand, be required to give what may be termed nominal bail, to answer "all latent demands," before the money will be paid to him from the registry of the court. I have considered, with much care, the form of the bond by which the sureties bind themselves upon this occasion. It is to this effect: — "That they are responsible to our lady the queen to restore a sum of money pronounced to be due by the court to the suitor in the cause, in case any person shall come in for his [ \*454 ] interest \*in the said sum;" the sureties also further bind themselves, their heirs, executors, and administrators, "to bring into the registry of the court a certain sum, whensoever the court shall order, and to save harmless the judge, registrar, marshal, and all officers of the said court." These concluding words are inserted exclusively for the protection of this court and its officers; and when I recollect what, in former times, was the legal condition of the officers of this court, namely, that they might be held responsible for error, if they departed in the slightest degree from the strict bounds of their jurisdiction, I am not surprised that these words should be inserted, *ex abundanti cautela*, for their protection. From my own experience in this court, I am not aware that any judicial interpretation has ever been put upon an instrument of this kind; and I certainly feel it is no easy duty to attempt the interpretation in the present instance. In order to assist the case of Mr. Bowdler's parties, the instrument in question must be construed to mean, that the owners of the remaining portion of the cargo on board this vessel are at liberty to come in at any time they may think fit, and, having established their claim, are entitled to share *pro rata* in these proceeds. I do not, I confess, so read the instrument; and I cannot find in it any words which can, by possibility, sustain any such con-

struction. I am even inclined to doubt if the instrument itself has any application at all to a claim of this description. Looking to the whole tenor of it, I am rather disposed to believe that the expression referred to applies exclusively to the original interests in the subject-matter; as in cases of title, where the proceedings had been *in pœnam* and the ship had been condemned without an appearance. It is not necessary, however, that I should decide this point in the \*present instance; it is sufficient for me to state that, [ \* 455 ] upon a careful consideration of this instrument, I cannot find any expressions which, by the most extended construction, can be interpreted to mean that a suitor *prior potens*, who has obtained his money, shall bring it back for the purpose of sharing it with a subsequent suitor, who has no preferential claim. I say bring it back, because, as far as this case is concerned, I see no distinction in principle between bringing back the money and being prevented from receiving the whole without paying part over to another person. If I am correct in the view which I have thus taken of the instrument under consideration, it is clear that, as far as its contents are concerned, it can furnish no foundation for the claim which is now set up. It may be said that, by the terms of the instrument, I am empowered to order the money to be brought back. It may be that I am possessed of such an authority; but I cannot redistribute the money so brought back by the force of any directions which are to be found in the instrument; neither can I discover any principle of equity, as administered in other courts, which would justify me in taking such a step. No court of equity, I am satisfied, would interpose its authority to such extent in favor of a creditor, who should come in and invoke its interference after a decree had been obtained by another creditor of the same degree; and it would ill become this court, exercising as it does an equitable as well as a legal jurisdiction, to do that which a court of equity would decline.

It has been suggested that the ancient practice of the court, as it has long been understood, is in favor of the application, and bears out the claim which is set up. If this be so, and the proof of such practice \* be satisfactorily established, it would, [ \* 456 ] undoubtedly, be my duty to conform to that practice, however opposed to my own views and reasoning upon the matter. But I must first be satisfied that such a practice really exists. If the practice has a legal existence, in the long series of years during which this court has exercised its jurisdiction, cases must surely have occurred in which the asserted practice has been applied. I myself know of no such cases, and none have been mentioned; and, in the absence of such cases, I do not feel disposed, upon the mere

understanding that such a practice has prevailed in this court, to depart from a principle which has been distinctly recognized and adopted in other courts. In the course of the argument I have been referred to the statute 53 G. III. c. 159; and it has been urged by one of the learned counsel, I believe Dr. Harding, that I might give the relief prayed for under the provisions of this statute, by calling in aid the fifteenth section. The fifteenth section is in these words: —“Be it further enacted, that if any suit for any such loss or damage as aforesaid shall be instituted, or depending in any court competent to act as a court of equity for the purposes of this act, such court shall and is hereby authorized and empowered to proceed in such suit for such purposes, in the same manner, and under the same regulations, and with the same powers, as are herein given to courts of equity, so far as the same are applicable to the nature of such court and the forms of proceedings therein; and such court shall use all such means as a court of equity is by this act empowered to use for the purposes of this act.” Assuming, for the purposes of this discussion, that the Court of Admiralty is included under the provisions of this section, the following difficulty [ \* 457 ] arises, namely, that the right of filing the bill \* in equity is exclusively given by the act to the owners for their protection, and not to the claimants for their advantage. This is a difficulty which I am unable to overcome; and however desirous I should have been to have assisted the claimants, if their application had been made in due time, that is, before my decree was pronounced, I am clearly of opinion that I cannot now extend in their behalf the provisions of this statute, beyond the limits which the legislature intended. The power conferred by the statute is a power created by act of parliament, and must be limited by the terms of the act itself.

In concluding my remarks upon this part of the case I may here observe, that if bail had been given in the present instance, such bail, I apprehend, would have been responsible only to the plaintiffs in the action which they had bailed. It could not, I conceive, for a moment be contended, that the claimants bringing the subsequent actions would have any title to recover against such bail, or to participate in any fund which they might bring into the registry of this court, in discharge of their liabilities as bail. The whole question which has formed the subject of this discussion will receive a more satisfactory solution by a short reference to first principles. How stood the ancient law, with respect to cases of damage? By the ancient law, owners of damaging vessels were responsible to the full extent of the damage which they had occasioned; and the parties

complaining of the loss or damage might proceed, at their election, either in this court or the courts of common law. If the owners of the damaging vessel bailed an action brought against them by one set of claimants in this court, other parties, whose property had been injured, might arrest the vessel in a second and separate action. \* This, I conceive, might have been done *toties quo-* [ \* 458 ] *ties*; and where all parties were equally active in bringing their suits before any final decree was pronounced, the proceedings of the court were so regulated as to secure a ratable distribution of the fund between the various claimants having similar claims; a preference, however, was at all times given to the party who, by his vigilance, availed himself first of the remedy of the law in obtaining a judgment. Having once obtained such judgment, he could not be compelled to surrender the benefit of the court's decree, by sharing it with other claimants who might have been less active. How do these principles apply to the present case? It is said that the ship is a foreign ship, and that, in consequence of the owners being resident abroad, the right of action which remains to the injured parties is altogether nugatory. Be it so. Will that circumstance entitle a person who has not exercised his right of proceeding with proper diligence to share with him who has? I am of opinion that it would not. I will put the following case:— A creditor brings an action against an executor in a court of equity, the creditor recovers a judgment, and the executor afterwards quits the country and escapes out of the jurisdiction of the court; could another creditor, who had neglected to sue whilst the executor was in this country, demand from the court that the money received under the judgment by the first creditor should be distributed *pro rata*, in liquidation of their respective claims? Clearly not. The same principle, it appears to me, is directly applicable to proceedings in this court in a case of this description; and I do not consider that I should be justified in making any distinction in the present instance, upon the grounds of the suggested difficulties arising from \* the cir- [ \* 459 ] cumstances that the vessel is a foreign vessel, and the owners are resident abroad.

I must now advert, in conclusion, to another ground which has been urged in support of this application; namely, the alleged agreement between the proctors of the respective parties in the cause. It is averred in the act on petition, first, that Mr. B., the proctor for the parties making this application, delayed commencing his action with the consent of the proctor for the promoters of the original suit. Secondly, that there was a mutual agreement between the proctors that all parties should share ratably in the proceeds of the vessel.



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The Saracen. 2 W. Rob.

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These averments would be important if duly established; but how are they met in the present instance? Why they are met by a distinct and total denial on the other side. "M. expressly denied that he ever at any time recognized the claims of B.'s parties to participate ratably with his parties in the proceeds of the sale of The Saracen, or that any proposal for the division of the proceeds amongst all the owners of The Diligent and her cargo, in proportion to the damage sustained by them respectively, were ever made to him at any time prior to the month of June last." The act on petition, I am aware, is supported by the affidavit of Messrs. B. and B., and no affidavit has been made in support of this averment which is set forth in the answer to the act. With respect to the affidavit of Messrs. B. and B., I entertain not a shadow of a doubt but that such affidavit contains their real apprehension of all the facts; at the same time I cannot suppose that the proctor on the other side, in setting forth the statement contained in his answer, has made averments as to his own personal acts in these proceedings which are not true [ \* 460 ] in his belief. It is no part of my present duty to \*reconcile these contradictory statements, neither is it my intention to enter more in detail into the agreement itself, because I am of opinion that the asserted agreement, even, if established, could not be carried out by the authority of this court. If it be a valid agreement, its enforcement belongs to the jurisdiction of other courts, and to those courts the parties must resort for any assistance they may require. Then how stands the real question which I have to determine? I am asked to alter a decree made by the court in favor of parties who have been vigilant in supporting their own claims, and to deprive them of a great part of the benefit of such decree by making them share it with others who have been less diligent and less careful of their own interests. I am of opinion that I am not authorized so to do, either by law or by the practice of the court. I must, therefore, pronounce against this application for a *pro rata* distribution of the proceeds, and direct the proceeds to be paid out to Mr. Middleton's parties. Looking to the difficulties of the case, and considering that the question which I have had to decide has, I believe, come before the court in its present shape as a question *primæ impressionis*, I do not think I am called upon to make any order as to costs.

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La Constancia. 2 W. Rob.

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LA CONSTANCIA.<sup>1</sup>

March 25, 1846.

Where a bond of bottomry is given upon the ship alone, and another bond is likewise given upon the cargo only, demands for pilotage, towage, and seamen's wages must be satisfied *pro ratâ* out of the proceeds of the ship and the freight.

An application of the bondholder upon the ship only, to have these demands satisfied out of the proceeds of the freight in the first instance, rejected.

In this case (reported *supra*, p. 404) the court decided that the two bonds upon the ship only should be paid out of the proceeds of the ship exclusively, and that the bond upon the cargo alone should be paid first out of the proceeds of the freight, and \*if these should be insufficient, that the balance should be [ \*461 ] made good out of the cargo. The consignees of the cargo brought into the registry the sum of 1,550*l.*, part of the value of the cargo, being the full amount of the bond upon the cargo. They were also about to bring in the amount of the freight, but at the instance of the bondholders, they paid out of it the sum of 554*l.* 7*s.* 1*d.* to answer demands for pilotage, towage, and seamen's wages. The question was argued on the 3d of February, whether these claims for wages, pilotage, and towage, should fall upon the freight alone, or should be paid *pro ratâ* out of the proceeds of the ship and freight. The court having taken time to consider its judgment, the case now came on for decision.

In arguing the case it was submitted by

*Addams* for the consignees of the cargo — That it was the settled law of the court, where a bond was given upon the cargo, that the ship and freight must be first applied in satisfaction of the bond, and that there was no claim against the owners of the cargo until these funds were exhausted. This doctrine had been laid down by Lord Stowell in the case of *The Prince Regent*, and had been specially referred to and upheld by the court in delivering its judgment when the case was last before the court. That by its last decision the court had already decided, that the two bonds upon the ship must look for payment to the proceeds of the ship only, and that the freight was to constitute the primary fund for the payment of the bond upon the cargo. How far would that decision be affected by granting the

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<sup>1</sup> [S. C. 4 Notes of Cases, 285, 512; reported again 2 W. Rob. 487.]

application now made on behalf of the bondholder upon the ship?

The effect would be, that the former decision of the court [ \*462 ] would \*in a great degree be rendered nugatory, because instead of the whole freight, minus its quota of these payments, going to the relief of the cargo by a strict appropriation of the proceeds to the bond upon the cargo, a great portion would be exhausted in favor of the bonds upon the ship. The practical result, therefore, would be a partial reversal of the former sentence of the court. Relief would be given to the bondholder upon the ship instead of the owner of the cargo, and this, too, at the expense and out of the pocket of the owner of the cargo. That such an appropriation of the proceeds would be contrary to all principles of law or equity. By the law of the court the ship and freight were ratably liable for the debts and expenses which had been incurred in the present instance. This had been laid down and acted upon by the court in the case of *The Dowthorpe*, (2 Rob. jun. p. 75,) and there was nothing in the circumstances under which the application was made that could take the case out of the principle laid down by the court in the case of *The Dowthorpe*.

*Haggard* for the holders of the bonds upon the ship — The wages of the mariners constitute the larger portion of the demands which have been paid out of the freight in the present instance, and the law of this court looks to the freight as the primary fund for the payment of such wages. In the case of *The Juliana*, 2 Dodson, p. 510, the doctrine is laid down by Lord Stowell in these words: "The mariner goes to sea upon the single security of the freight; his labors and perils have nothing else to trust to; if that goes, every thing goes; he has no step-father, if I may so say, in the character of insurer, to supply the loss." If this be the doctrine of the court upon [ \*463 ] \*the high authority of Lord Stowell, it is clear that the demands in this case have *prima facie* been satisfied out of the funds which could be most appropriately employed for the purpose. Is there any thing in the circumstances of the case to induce the court to interfere with the arrangement by which these demands have been satisfied? I submit there is not. On the contrary, a strong reason may be drawn in favor of the arrangement as it now stands, from the consequences which must fall upon the bondholders upon the ship if the court should accede to the doctrine laid down upon the other side. What would be the effect? Why, that the holders of the first bond upon the ship must inevitably lose the whole of the money they have advanced. The court exercises an equitable as well as a legal jurisdiction in these matters, and it would

surely be contrary to all equity that this loss should be entailed upon the bondholder, when, by a proper marshalling of the assets, such a result might be avoided.

#### JUDGMENT.

DR. LUSHINGTON. The learned judge having adverted to the circumstances of the case, and having restated the law with respect to the bond upon the cargo only, to the effect laid down in his former judgment, (*vide supra*, page 405,) proceeded to observe: In the existing state of things I have been compelled to go through these details in order that I might show the true principle of applying the proceeds, otherwise I could not say in what way the charges on the funds should be defrayed. I now come to the real question, namely, out of what fund are the wages, pilotage, and towage to be paid? I am asked to decree that these charges should be defrayed out of the freight solely. Why? For \*what reason should I [ \* 464 ] hold the ship exempted? The ship *prima facie* is as much benefited by the services of the pilot and seamen as the freight. But I am desired so to exempt the ship, and to charge the freight exclusively, that I may rescue the holder of the first bond upon the ship from a total loss of the money which he has advanced; and the holder of the second bond from a partial loss of his advances. I should be very desirous that this might be done, if it could be done with justice to other parties; but what will be the consequence if I accede to the prayer of these bondholders? Why, the owner of the cargo must be the sufferer. I cannot relieve the former without taking from the latter. The owner of the cargo can never be affected by any bond of bottomry until the ship and freight are exhausted, and he ought never to be made liable for wages, pilotage, and towage directly. This I am called upon to do indirectly in the present instance, by making the decree as prayed for. I know of no principle of equity that would justify me in making such a decree. If the interests of the bondholders were alone concerned, and the ship, freight, and cargo belonged to one individual, some such principle might possibly be found, and I might make him who had a treble security upon ship, freight, and cargo, resort to the cargo, in order that others who had a security upon one, namely, the ship only, might be paid. That is not the state of the case here. The intermediate bond is on the cargo alone. The peculiar interest of the owner of the cargo intervenes, and that interest I am bound to protect. His interest is, that the proceeds of the ship and freight should be ratably applied to the discharge of liens which legally fall upon them in the first instance; next, that the two bonds upon the ship should be

[ \*465 ] paid out of the \*remaining proceeds of the ship, and then all other demands which may stand *in pari conditione*. The result then is, that 554*l.* 7*s.* 1*d.*, the amount of the wages, pilotage, and towage, must first be paid ratably out of the gross freight (794*l.* 2*s.*) and the proceeds of the ship (499*l.* 2*s.* 4*d.*); the effect will be that 285*l.* 1*s.* 2*d.* will be left to pay the bond of the 9th of April, and 453*l.* 3*s.* 10*d.*, the balance of the freight, to pay the bond on the cargo before the cargo is resorted to.

Before this judgment was delivered an application was made by *Dr. Jenner*, on behalf of the owners or consignees of the silver which had been sold at Bahia, claiming to be repaid in preference to the bondholders or any other creditors the amount of the silver which had been sold. The learned judge, after intimating an opinion that the claim in question was more properly a question of average, directed the matter to stand over for further argument, stating that he would not order the proceeds to be paid out of the registry until the prayer had been argued and considered.

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### THE OCEAN,<sup>1</sup> Ward.

May 28, 1846.

Objection to the report of the registrar and merchants in a cause of bottomry in part sustained.

Where the bondholder had bought up the debts of certain creditors upon the ship, at a discount of 50*l.* per cent., the bondholder not at liberty to convert them into a lien upon the ship, by repaying himself out of moneys advanced by him upon bottomry.

Allowance of the registrar and merchants, that such debts should be included in the bond, and the amount of the sums actually paid for them, overruled, and the claim directed to be struck out.

In this case, reported *supra*, page 429, two bonds of bottomry were referred generally to the registrar and merchants to report thereon.

Upon the 11th of March the registrar and merchants reported, that upon the two bonds in question there was due to Mr. Hall, the bondholder, the sum of 629*l.* 13*s.* 7*d.*, together with interest at 4 per cent. from the 26th of July, 1844, when the bonds became due,

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<sup>1</sup> [S. C. 4 Notes of Cases, 566.]

until payment thereof. In this report the registrar and mer- [ \*466 ] chants allowed Mr. Hall the debts which he had purchased of the ship's creditors at Sydney, to the amount of the sums which he had actually paid; they also allowed the maritime interest at 35 per cent., together with the 10 per cent. commission charged upon the receipts and disbursements of the vessel on the homeward voyage.

This report was objected to on behalf of the mortgagee, and the objections were argued by

*Harding*, for the mortgagee.

*Addams and Robinson*, contra.

JUDGMENT.

DR. LUSHINGTON. When this case was last before the court I expressed my opinion that the entire case was surrounded with circumstances of very great suspicion. I therefore adopted the course of referring to the registrar and merchants the whole of the accounts, in order that they might investigate and ascertain what were the real sums advanced by Mr. Hall, what the payments he had made, and what balance was due to Mr. Hall, upon which a bond of bottomry could legally be taken. It is obvious that in all questions of this kind this mode of referring the accounts for investigation is of great importance in informing the ultimate judgment of the court, more especially as regards the question of costs. Suppose, for instance, a very considerable sum is claimed under the bond in issue, and that claim is, after a long litigation, cut down and reduced to a very small amount. In such a case the bondholder, I apprehend, would have no right to demand at the hands of the court the costs of that litigation, which was occasioned by the greatness \* of his [ \*467 ] overcharge. Again, the investigation is of importance in another point of view, namely, that the registrar and merchants, by their experience in mercantile matters, might elicit and detect a multitude of errors, and, in some cases, even a falsification in the charges, proving that a system of fraud has been pursued by the asserted bondholder in his dealings with the vessel; in which case the court would not pronounce for a single sixpence. In the present instance the registrar and merchants have made their report in the usual form, and their report having been objected to by the mortgagee of the vessel, I have now to consider the effect of the objections which have been raised. The first and most important question is, whether Mr. Hall, having purchased, at less than their real amount, certain debts contracted for the service of the ship, is entitled to recover under the bond



executed at Sydney the sums of money which he actually did pay to the creditors on account of such debts. It has not been contended upon the present occasion, that Mr. Hall is entitled to the whole nominal amount of these debts : his claim is now limited to the sums actually paid by him to the creditors in consideration of the transfer of their debts. The question then arises whether, in point of law, the transfer of such debts by the original creditors conveyed to Mr. Hall any power to convert them into a lien upon the ship itself, by repaying himself the amount out of moneys advanced by him upon a bond of bottomry. I well recollect the observations which I made upon this point when the case was last before me ; and in making those observations I had in view the case of *The Augusta*, decided by Lord

Stowell, and reported in the 4th [1st] volume of Dodson's [ \*468 ] Reports, p. 283. Looking to the principle laid down \*by the very eminent judge who decided that case, I have no hesitation in saying, that Mr. Hall was not at liberty to make any such conversion. It has been said in the course of the argument, if a person may advance money upon bottomry for the payment of debts due to other creditors, why may he not do so with regard to his own claims against the vessel ? The reason is obvious, namely, that it would lead to a course of dealing with the vessel which would open a door to every description of fraud, and would, moreover, be subversive of the foundation upon which the law of bottomry is based. Another observation was also thrown out in the argument,—that in preventing Mr. Hall from including the debts of the original creditors amongst the allowed items in the bond, the court was straining against him the principle laid down in *The Augusta* to an extent that is contrary to the course of justice and equity : I cannot admit the truth or propriety of such an argument. In purchasing the debts Mr. Hall put himself into the place of the original creditors ; and his right to recover those debts must be the same as was possessed by the creditors themselves, namely, by a proceeding against the owners, or the person who contracted the debts on personal credit originally. I am clearly of opinion that I must refer back the report to the registrar and merchants to have these items struck out altogether. The next objection which has been taken is, that the registrar's report is not sufficiently specific as to the reasonableness of the 10 per cent. charged for commission upon the receipts and disbursements of the vessel on her homeward voyage. This objection may, I think, be very shortly disposed of by the simple answer, that the report is made in the usual form, and that it is not the general course for [ \*469 ] the \*registrar and merchants to specify that such a claim is reasonable or just : they allow the claim generally, thereby

expressing by implication that they have deliberated upon the claim, and have satisfied themselves that it is not unreasonable. The objection upon this part of the report must be overruled.

I have now to consider, in conclusion, the general validity of the bonds in question. With respect to the larger and primary bond executed at Sydney, I think that I am bound to pronounce for its validity; at the same time I cannot express my opinion in too strong terms as to the difficulties that Mr. Hall has thrown in the way of his own case. When I look at the letters written by Mr. Hall in Mr. Rostrom's name after the bankruptcy of Mr. Rostrom, and when I consider the species of veil that has been thrown over the whole transaction, I am satisfied in my own mind, that the opposition which has been offered in these proceedings has been fully justified; and that those interested in the ship did perfectly right in requiring that the justice and truth of the bonds in issue should be thoroughly sifted in this court. With respect to the bond executed at Pernambuco, I confess that I at first felt much more difficulty; and the difficulty which pressed upon me was this, not that Mr. Hall was indebted to the ship to the amount of 45*l.*, his passage money from Sydney, but that whilst the vessel was at Pernambuco he had in his possession an account of the ship's bills for 240*l.*, said by the registrar to be good bills, drawn upon parties in London. These bills, I naturally conceived, might have been negotiable at Pernambuco to the full extent of the ship's necessities; and if so, it is clear that I should not have been at liberty to pronounce for the validity of this bond. I am now informed that \* these bills, not having been accepted, [ \*470 ] were not negotiable at Pernambuco. This fact of course alters my view of the case, and removes the difficulty. I do not think the doubtful circumstance, as to whether Mr. Hall ought to have paid his passage money prior to the sailing of the vessel from Sydney, is sufficient to operate against his bond.

I therefore pronounce for both the bonds, subject to the deductions to which I have referred. With respect to the costs, after much deliberation upon the subject, I have come to the conclusion that it is my duty to give costs on neither side: I make no order as to costs.

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The Duke of Manchester. 2 W. Rob.

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THE DUKE OF MANCHESTER,<sup>1</sup> Murray.

June 10, 1846.

A claim of salvage set up by a steam-tug dismissed, and the alleged salvors condemned in the costs of the proceedings, upon the ground that by their own misconduct they had run the vessel into difficulty and danger, by towing her aground upon the Sandwich Flats.<sup>2</sup>

THIS was a cause of salvage, promoted by the owners, master, and crew of the steam-tug The Copeland, for alleged services rendered to this vessel in getting her off the Goodwin Sand, and towing her up to London upon the 17th December last.

Two other actions were also entered for salvage services arising out of the same transaction; the one was entered on behalf of the owners, masters, and crews of the lugger Vampire and the galley Triumph of Deal; the other on behalf of the owners, masters, and crews of the luggers United Friends and Friends Goodwill of Ramsgate.

The acts on petition of the several salvors, in substance pleaded, "that the vessel was discovered about 4 o'clock, P. M. of the 13th December, aground upon the Goodwin Sand; whereupon The Triumph and The Vampire, having put off to her assistance, their services [ \*471 ] were accepted, and The Triumph was \*despatched by the master to Ramsgate to procure the aid of a steamer. That The Copeland, then lying at anchor in Ramsgate Hole, immediately went off, and at half-past 9 P. M. came up with The Duke of Manchester, and found her at such time stranded midway between The Gull Light Vessel and the North Sand Head, with her best bower anchor and chain cable out, and thumping and striking heavily upon the sand. That with great difficulty and exertion, and at the imminent risk of life and property, the master of the steamer succeeded in gradually dragging the vessel off the sand, and sheering her head round into deep water, when he took her in tow, and was proceeding to tow her into the Downs; but in consequence of the damaged condition of the rudder, The Duke of Manchester would not answer her helm, and in her progress to the Downs steered on towards the shore, and again took the ground upon the Sandwich Flats, where she con-

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<sup>1</sup> [S. C. 4 Notes of Cases, 575. Affirmed on Appeal, 6 Moore, 90.]

<sup>2</sup> [For note of cases as to forfeiture or diminution of salvage by misconduct, see The Joseph Harvey, 1 C. Rob. 306; The Barefoot, 1 Law & Eq. Rep. 661; The Glory, 2 Law & Eq. Rep. 551; The Cape Packet, 3 W. Rob. 122.]

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The Duke of Manchester. 2 W. Rob.

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tinued fixed until about 12 A. M. of the 15th of December. That during the interval every exertion was made by the several salvors for the safety and preservation of the vessel, and about noon of the 15th, the ship having been lightened of a large portion of her cargo by the crews of the several boats, she was hauled off the sand by The Copeland, and towed in safety into the Downs. That on the following day she was towed to Southend, where she anchored for the night, and upon the 17th she was brought into the West India Docks, where she arrived at about half-past 2 P. M."

The answer given in on behalf of the owners of The Duke of Manchester in substance alleged: — That the services of the smaller boats were confined to the mere lightening of the ship, and conveying on shore the portions of the cargo taken out of the vessel, and \* that, at the time their services were engaged, [ \* 472 ] the boatmen were expressly told that they were not to be employed as salvors, but were to be paid *pro opere et labore*; that The Duke of Manchester was extricated from the Goodwin Sand, not by the exertion of the steamer, but by the influence of the tide; that the vessel, whilst upon the sand, was in no danger of being lost, and that no risk of loss of life or property was incurred by the master and crew of The Copeland; that, when she got off the Goodwin Sand, The Duke of Manchester had sustained no damage, and that her subsequent injuries were occasioned by the gross negligence and misconduct of the steamer, in towing her out of her proper course to the Downs, and running her aground on the Sandwich Flats; that, by reason of the premises, the owners were entitled to be dismissed from further observance of justice in the suit.

The case was argued by

*Addams and Bayford*, for The Copeland.

*Phillimore and Jenner*, for The Triumph.

*Haggard and Robinson*, for The United Friends and Friends Goodwill.

*Queen's Advocate and Harding*, for the owners.

The court was assisted by Trinity Masters.

#### JUDGMENT.

DR. LUSHINGTON. Gentlemen — The part of this case upon which I shall have to request the benefit of your opinion, is confined to the

claim which is set up by the owners and crew of The [ \*473 ] Copeland. With respect to the \* smaller vessels, their claims involve no question of nautical skill, risk, or danger, beyond such as the court is in the daily habit of deciding by its own unassisted judgment. You will, therefore, dismiss the smaller vessels entirely from your consideration. The case of The Copeland embraces two distinct questions: 1st. What were the services she performed whilst The Duke of Manchester was upon the Goodwin Sand, and how far those services were essential to the getting her off? 2dly. What was done by her at a subsequent period in attempting to conduct her into the Downs? The statement on behalf of The Copeland is, that The Duke of Manchester, having got upon the Goodwin Sand during the afternoon of the 13th December, the master despatched a small vessel to crave the assistance of a steamer, and The Copeland, in consequence of that summons, went to her assistance. Let us consider, in the first instance, what was the degree of danger in which The Duke of Manchester was placed, what were the measures pursued by The Copeland, and whether those measures were successful in getting the vessel off the sand, or whether she ultimately came off by the flowing of the tide. I will here refer you to the affidavit of Richard Sheresby, the master of The Copeland, so far as it relates to this division of the subject. He states that "he directed the steam-tug to be steered in different directions, to endeavor to find the said vessel, (the tug's crew feeling the way with the lead,) when, about half-past nine, P. M., a light was descried at a short distance from the tug; whereupon The Copeland was steered towards it, and, on approaching near thereto, it was found to proceed from some lighted coals hanging over the side of The Duke of Manchester, and it was then ascer- [ \*474 ] tained that the said vessel had gone on the sand, \* midway between The Gull Light Vessel, and the North Sand Head, and was at such time there stranded, with the best bower anchor and chain cable out, and which had been let go on the edge of the sand on her first striking thereon, and that the said vessel was moreover striking and thumping heavily on the sand, by reason of the heavy sea then running." He then goes on to say "that, in the course of about half an hour, and after great difficulty and many ineffectual attempts, The Copeland was placed in such a position to windward of The Duke of Manchester that a line was hove on board, whereby two hawsers, one six inch and the other seven inch, were passed from The Duke of Manchester to The Copeland; that the said hawsers were made fast to the towing hooks on board The Copeland; and (I now come to an averment to which I must invite

your very particular attention,) that, during this operation, the steam-tug pitched in such a frightful manner, that the lives of all on board her were exposed to the most imminent danger.

Now, gentlemen, I do not mean to detain you by reciting from this affidavit all the details which follow this averment, as to the repeated breaking of the hawsers, or the various attempts that were made to drag the vessel off the sand. I must, however, again direct your particular attention to another averment, with which the affidavit of this witness concludes; it is in these words:—“He lastly made oath that, had it not been for the services of The Copeland, The Duke of Manchester, with her cargo, must have been inevitably lost; and that the steamer herself, as also the lives of the deponent and the rest of the crew on board thereof, were exposed to the greatest and most imminent danger, in rendering the services aforesaid; inasmuch as if the steam-tug Copeland had touched the \*sand she must have gone to pieces, by reason of the great [ \* 475 ] weight of her machinery, and probably every soul on board would have perished.”

I need not point out to you, gentlemen, that the two main ingredients in all salvage services are, 1st. The danger to which the property is exposed; 2dly. The danger encountered by the salvors in the rescue of that property. Upon these two particulars depends the measure of the compensation to be awarded. If, then, in answer to certain questions which I am about to put, you shall be of opinion that The Duke of Manchester, whilst upon the sand, was, according to the statement of the witness, in imminent danger of being lost, the first ingredient will be established. The second ingredient will depend upon your further judgment, whether the services of The Copeland were such as are described, and whether they were attended by that degree of risk and peril which is most explicitly averred in this affidavit. You have all the evidence before you, and you have not only carefully read that evidence yourselves, but have heard it very elaborately discussed by the learned counsel who have argued the case. You are, consequently, well aware of the contradictions which exist in the respective statements on the one side and on the other. I shall, therefore, leave this part of the case to your decision, by proposing to you the following questions:—First, was The Duke of Manchester, whilst she remained upon the Goodwin Sand, in imminent danger of being lost? Secondly, were the measures pursued by The Copeland, to get her off the sand, the proper measures to be adopted? Thirdly, was the vessel actually got off the sand by means of these measures? Fourthly, was the service



performed by The Copeland attended with any great degree of danger to that vessel and her crew?

[ \* 476 ] \* I have framed these questions with the view of embracing all the points which can be properly submitted to you upon this part of the case. I have framed them after much consideration upon the subject; and although I shall not put it to you to consider what is the amount of the remuneration to be allotted, I need scarcely say that, in fixing that remuneration, my final award will be most materially influenced by the result of the answers which you shall return upon these several points. I should, I confess, feel very considerably relieved if the case terminated here; but I regret to say there remains another question to be considered, involving much greater difficulty and much graver consequences to the parties who are interested in this case, namely, what was done at a subsequent period, in attempting to conduct this vessel into the Downs? It appears that, after the vessel was got off the Goodwin Sand, whether she was got off by the aid of the steamer or whether she floated off with the tide it remains to be shown, the steamer was directed to take her in tow towards the Downs; that she proceeded to tow her, in accordance with this direction, and that The Duke of Manchester was again run aground upon the Sandwich Flats. Now it strikes me, subject to your better judgment, that the course to the Downs must have been so well known to all the persons on board The Duke of Manchester, and to the persons on board the steamer and the smaller vessels which attended her, that it is almost impossible to suppose the vessel would have taken a directly different course and gone upon the Sandwich Flats, unless from the extraordinary state of the weather, or from the damaged condition of the vessel, or from the fault of the steamer, or of the pilot on board The

[ \* 477 ] Duke of Manchester. I mean to say that it could \* not have been purely accidental. It will be for you to determine hereafter to which of these causes the second grounding of The Duke of Manchester upon the Sandwich Flats is to be attributed; but, before I propose to you the questions which I intend to put, I must first state very briefly two propositions of law which, it appears to me, are immediately connected with the consideration of this part of the case.

In the first place it is, I apprehend, an undoubted proposition, that salvors may be curtailed or even deprived altogether of their salvage remuneration through error, misconduct, or want of skill and capacity in the performance of a salvage service. Even where essential services have been rendered to a vessel, the subsequent misconduct of the salvor may not only diminish the amount of his reward, but his entire

claim may be forfeited. This doctrine was distinctly laid down by Lord Stowell in the case of *The Medina*,<sup>1</sup> which was cited by the Queen's Advocate; and in the case of *The Neptune*,<sup>2</sup> which came before me, and in which I was assisted by two gentlemen of the Trinity Board, I myself acted upon this doctrine, and declined to give any salvage at all, the Trinity Masters having pronounced that the asserted salvors had been guilty of gross negligence, if not of wilful carelessness, in allowing the anchor to be let go, and in keeping the course of the ship to the north when they should have gone to the south.

I will now state another proposition of law which has a most important bearing upon the present consideration, and I will state it clearly, that if I am wrong my statement may be examined elsewhere and corrected, — that proposition is, that where a steamer, as in the present instance, is towing a vessel with a \*licensed [ \*478 ] pilot on board, the steamer is not relieved from the responsibility of watching the course which the licensed pilot pursues.<sup>3</sup> If she finds to a certainty that the course pursued by the pilot will lead the vessel into danger and destruction, it is the duty of the steamer to make the circumstance known to the master of the vessel, that he may take such measures as may be necessary under the circumstances of the case; it is not for the steamer to maintain a sulky silence and make herself instrumental in the destruction of life and property. It is the more necessary that this proposition should be clearly defined and distinctly understood in the present instance, because it has been contended in the argument, that *The Duke of Manchester* being in charge of a licensed pilot, the only duty of the steamer was to follow up the course which the pilot directed; that she had nothing to do with that course, whether it was right or wrong, and was not bound to interfere to prevent the consequence of steering in a wrong direction.

In support of this argument the case of *The Duke of Sussex*<sup>4</sup> was cited; and I must now refer to that case in order to point out not only to you, but to the learned counsel and the practitioners in this court, what were the principles laid down by me in that case, and how far they are applicable in the present instance. The action in that case was brought on behalf of her Majesty, in her office of admiralty, against a steam-vessel which had a merchant vessel in tow, that vessel being at the time in charge of a licensed pilot. In rounding Cookham Point in the river Medway, the merchant vessel came

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<sup>1</sup> [Not reported.]<sup>3</sup> [See *The Christina*, 3 W. Rob. 27.]<sup>2</sup> 1 Rob. jun. 297.<sup>4</sup> [1 W. Rob. 270.]

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The Duke of Manchester. 2 W. Rob.

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into collision with *The Thalia*, which was lying at anchor, and the crown proceeded against the steamer as the party to blame. The defence of the steamer was two-fold: 1st. That the collision [ \* 479 ] was accidental; 2dly, That a licensed \* pilot was on board the merchant vessel, and that the conduct of the steamer was under his immediate direction and control. In delivering my judgment I expressed my opinion in these words: "In point of law, I am of opinion, that the responsibility for the due navigation of *The Chieftain* did not rest with the steamer proceeded against, but with the pilot who was in charge of *The Chieftain*." After stating my reasons for this opinion, which it is unnecessary for me here to repeat in detail, in conclusion of my judgment I expressed myself in these words: "If it should appear that there has been no error or negligence on board the steamer, and that the orders of the pilot were properly executed, I must hold the owners exonerated from the consequences of the accident." The two gentlemen from the Trinity House, by whom I was assisted, pronounced that there was no default on the part of the steamer. I consequently decided in favor of the steamer, and dismissed the case. But what was the main and real ingredient in that decision? Why, that there was no error or neglect on the part of the steamer. I never laid down the doctrine, that under all circumstances it was the duty of the steamer not to interfere, and that the pilot was the only person upon whom the responsibility rested.

In the case of *The Diana*<sup>1</sup> (in which case my judgment was confirmed by the judicial committee) I distinctly laid down the contrary principle. In that case the pilot on board had been grossly negligent of his duty, and the master and mate of the vessel had given up the entire management of the vessel to the pilot, and were diverting themselves in the cabin below when the collision occurred. I held in that case, that the collision was occasioned by the joint mis- [ \* 480 ] conduct of \*the pilot, the master, and the mate of *The Diana*, and that the owners were responsible for such misconduct. It is, I conceive, the duty of the master to observe the conduct of the pilot, and in the case of palpable incompetency, whether arising from intoxication, or ignorance, or any other cause, to interpose his authority for the preservation of the property of his employers. In such a case the vessel and lives of the crew are not to be risked because there is a law which, under ordinary circumstances, imposes the responsibility upon the pilot. So in the case of a steamer

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<sup>1</sup> [1 W. Rob. 131.]

which has a vessel in tow with a licensed pilot on board, if the master of that steamer sees that the pilot is incompetent to direct the course of the vessel, is he blindly to follow his orders and allow a valuable property and still more valuable lives, to be imperilled? I never laid down such a proposition. I now come to the questions which I have to propose for your consideration upon the latter part of this case. They are as follow: First, Was the grounding upon the Sandwich Flats occasioned by the state of the weather, or the disabled condition of The Duke of Manchester? Secondly, Could this stranding have been prevented by ordinary skill and vigilance? Thirdly, Was there on the part of The Copeland gross negligence and want of skill? And, lastly, Did she knowingly allow the ship to run into danger? The law will rest with me, but my decision will depend upon the answers which I receive from you. I think, therefore, it will be expedient that we should adjourn for the purpose of considering these points.

The learned judge having consulted with the Trinity Masters in the Inner Hall, upon resuming his seat proceeded to observe — The answers of the Trinity Masters upon the questions I proposed \*to them in this cause are to this effect: [ \* 481 ]

1st. We do not think The Duke of Manchester, whilst upon the Goodwin Sands, was in the perilous situation described by the owners of The Copeland. She grounded during the last quarter ebb, and never had less than ten feet of water alongside; provided, therefore, she remained staunch and tight there was every reasonable prospect that the next tide setting to the N. N. E., from half-flood to half-ebb, would have carried her into deep water.

The second and third questions are thus answered together: We do not think that the attempted operation of jerking the ship off the sand was calculated to effect any other result than that which occurred, namely, the repeated breaking of the hawsers; and to this cause must be ascribed the parting of The Duke of Manchester's bower chain. Further, it does not appear to us that The Copeland had hold of the Duke of Manchester at the time she came off the sand, but that she subsequently took her in tow. Fourthly, we do not consider that The Copeland, during the operations in question, was exposed to the danger alleged in these proceedings. Upon the second division of The Copeland's case, the questions which I proposed are answered in these words: We think that the getting on the Sandwich Flats was not occasioned by the state of the weather or the disabled condition of the ship. We are decidedly of opinion, that the stranding of the vessel might have been prevented by ordi-

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The Switzerland. 2 W. Rob.

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nary care and skill; and that there was on the part of The Copeland great and culpable negligence and disregard of duty.

In the opinions thus expressed by the gentlemen of the [ \*482 ] Trinity Board I entirely concur; and I further \*think, that, in addition to a neglect of her own duty, The Copeland was guilty of a great breach of all moral obligation in persisting in the course which she took, without giving warning to the persons on board The Duke of Manchester. In my judgment that culpability is not in the slightest degree diminished by any error which might have been committed by the pilot on board The Duke of Manchester, because it is impossible, as I conceive, that the steamer could have been misled by any directions given by him, or could have believed that the course was the proper or due course. Under these circumstances, I feel it my duty to pronounce against the claim, and with costs.

The remainder of the case may be very shortly disposed of. With respect to The Triumph and The Vampire, I shall give the following sums: 5*l.* to each of the vessels; 10*l.* to Baker; and 5*l.* to each of the men. With respect to the luggers, The United Friends and Friends Goodwill, I shall award the sum of 60*l.* to both vessels, and the costs.<sup>1</sup>

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### THE SWITZERLAND, Knight.

July 28, 1846.

A vessel sailing upon a dark night with her studding-sails set, and not porting her helm in time, condemned in the damages.<sup>2</sup>

THIS was a cause of collision promoted by the owner of The Juno, a Swedish brig, against this vessel, her tackle, &c.

The collision took place between Start Point and Portland Bill, during the night of the 26th June last, The Juno at the [ \*483 ] time beating down channel \*close hauled on the larboard tack, and The Switzerland coming up channel with the wind five points free, and her studding-sails set.

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<sup>1</sup> NOTE.— This decision was appealed to the judicial committee, and the sentence of this court was affirmed, with costs.\*

<sup>2</sup> [The Virgil, 2 W. Rob. 201, and note.]

\* [6 Moore, 90.]

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The Switzerland. 2 W. Rob.

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On the part of The Juno it was alleged, that it was the duty of The Switzerland to give way, but she continued her course; and when the two vessels were close together, and a collision was inevitable, The Juno, with a view of lessening the damage, put her helm a-port.

The answer on the part of The Switzerland averred, that in consequence of the extreme darkness of the night, it was impossible for the crew of The Switzerland to see The Juno until she was close ahead on the starboard bow. That she made every endeavor to get out of the way; and that the collision was occasioned by The Juno porting her helm instead of keeping her course as she was bound to have done.

The case was argued before Trinity Masters by

*Queen's Advocate* and *Bayford*, for The Juno.

*Addams* and *Twiss*, for The Switzerland.

#### JUDGMENT.

DR. LUSHINGTON. Gentlemen,— The question in this case arises between two foreign vessels, the one being a Swedish brig of 131 tons burden, bound on a voyage from Stockholm to Viana, in Portugal; the other, the vessel proceeded against, being an American ship of 567 tons, and bound from New York to London. The collision is admitted to have taken place shortly after midnight on the 26th June last, somewhere between Portland Bill and Start Point; and it is also further admitted that The Switzerland was proceeding at the time up channel with the wind five points free. This, gentlemen, you will observe, is her own statement; it is there- [ \* 484 ] fore, I apprehend, altogether unnecessary for us to take into consideration what has been made a matter of dispute in the case, namely, whether the wind was W. S. W. as alleged by The Juno, or whether it was S. W. by S. to S. W. as stated by The Switzerland. There is also a further admission with respect to the state of the weather that the night was overcast with drizzling rain, although the degree of the darkness is somewhat controverted. The Juno, it appears, was sailing on the larboard tack, close hauled, and, according to the statement, she had a light in the foreshrouds. This averment is, I think, fully substantiated by the evidence in the cause; it is further alleged that The Juno observed The Switzerland two points on her weather bow, and hailed her to keep her luff; and that at such time The Switzerland had her studding-sails set. I know not, gentlemen, how far this fact may or may not be of importance in the con-



sideration of this case. If it is a fact important to the issue in the cause, it is my duty to direct you to form your opinion upon the assumption that the studding-sails were set as stated. It is distinctly alleged by The Juno in the act on petition, and I find no denial in the answer on the part of The Switzerland. The persons on board the latter vessel must have known what sails they were carrying; and if this were a matter of importance, it was their duty to have met the averment set forth in the act on petition. In the practice of this court a fact which is so stated in plea and is not denied must be taken as an admitted fact in the case. The Juno further goes on to

state, that after having hailed the ship to keep her luff, the [ \*485 ] ship not altering her course, and a collision being \*inevitable, the brig's helm was put to port, for the purpose of lessening the force of the blow, and almost immediately afterwards the ship, with her starboard bow, struck the brig on her larboard bow.

What on the other hand is the statement set forth by the owners of The Switzerland. They allege, in the first place, that no ship or vessel of any description carrying a light was visible at the period in question; at the same time they admit that a ship close hauled on the larboard tack was descried, and that one of the mariners called out "Sail on the starboard bow." That owing to the intense darkness of the night the discovery of the vessel in question was not made until so late a period, that no other measure could be adopted than that of putting the helm a-starboard, which was done accordingly, the crew of The Switzerland at the same time hailing the brig to keep her course. That instead of keeping her course as directed, the brig immediately put her helm a-port, and the stern of the brig struck the starboard side of the ship. The answer to the act then concludes with the averment, that had The Juno kept her course The Switzerland would have gone clear under the brig; and that the collision was entirely occasioned by the want of a good look-out, and of proper skill and management on the part of the persons on board The Juno. Such, gentlemen, is the blame which is attributed by The Switzerland to The Juno; and how far this blame is rightly imputed must, I apprehend, depend upon the degree of necessity which existed to compel the brig to put her helm a-port. It was not, I conceive, her duty to have adopted this measure, unless compelled by necessity; but I also conceive, that if in your opinion a necessity did exist, and

that it was the only measure which could be adopted to [ \*486 ] diminish \*the force of the collision, in that case The Juno will be legally absolved from blame. With respect to this part of the case therefore, gentlemen, you will have the goodness to favor me with your opinion, whether The Juno, in putting her helm

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The Switzerland. 2 W. Rob.

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a-port, did so under the circumstances to which I have adverted, or whether she did so unnecessarily and rashly, and in violation of the rules of navigation. With regard to The Switzerland, you will likewise favor me with your opinion, whether, looking to the darkness of the night, she was justified in sailing with her studding-sails set; and whether, under the circumstances of the case, she could have put her helm a-port at an earlier period, and could thereby have avoided the collision? With these observations, I will now leave the question to your consideration.

*Trinity Masters.* We are of opinion that The Juno acted perfectly right, that the collision occurred from The Switzerland not giving way in time and passing under the stern of The Juno, as she was bound to have done. The brig put her helm a-port merely to diminish the force of the collision, and at the moment there was no alternative but to put it up. Had The Switzerland struck her amidships, in all probability the damages in the present instance would have been aggravated by the addition of the loss of life.

PER CURIAM.

In this opinion I fully and entirely concur, and must accordingly pronounce for the damage; and I cannot dismiss the case without expressing my great satisfaction at the expedition with which the \*proceedings in the cause have been conducted [ \*487 ] throughout.

The collision took place upon the 26th of June, the suit was commenced upon the 13th of July, and upon the 28th of July the decision of the court has been pronounced. It is a matter very advantageous to all parties, and especially to foreigners, as in this case, when suits of this description can be so speedily arranged.

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La Constancia. 2 W. Rob.

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LA CONSTANCIA,<sup>1</sup> Monro.

July 28, 1846.

Where portions of the cargo on board a ship are sold by the master during the voyage for the repairs of the ship, the owners of such cargo have no lien upon the ship, nor any *persona standi* to sue the owners in the Court of Admiralty.

The property so sacrificed is to be considered as the proper subject of general average, over which the Court of Admiralty has no jurisdiction.<sup>2</sup>

WHEN this case was last before the court (*vide supra*, p. 460) an application was made on behalf the consignees of some silver, which formed part of the cargo, and which had been sold by the master at Rio Janerio, for the repairs of the ship, claiming to be repaid the amounts of the silver so sold, in preference to the bondholders or any other claimants, upon the proceeds of the ship and cargo.

The court directed the application to stand over for argument, and the question was now argued by

*Jenner* and *Bayford*, for the consignees of the silver.

*Addams* and *Haggard*, for the bondholders.

The argument in support of the application was rested upon the grounds, that the various transactions respecting the bottomry bonds, and the forced sale of the silver, were to be regarded as [ \* 488 ] French \*transactions, and were to be decided by the application of the law of France. That by the maritime law of France the consignees or owners of property, sold under the circumstances of the case, possessed a lien upon the ship in preference to bondholders or any other class of creditors; and this lien attached to the consignees of the silver in the present instance. That, even by the law of this country, the owners of property so sold would have an equitable lien upon the ship towards whose preservation the property had been exclusively applied, and such lien would entitle them, at all events, to come *in pari passu* with the bondholders, and share in the distribution of the proceeds of the ship and cargo. That this principle was acknowledged in the maritime courts of the United States, and had been acted upon by Mr. Justice Story, in the case of *The*

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<sup>1</sup> [S. C. 4 Notes of Cases, 677.]

<sup>2</sup> [Cutler v. Rae, 7 How. R. 729.]

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La Constancia. 2 W. Rob.

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Packet, 3 Mason, 255. That unless the consignees of the silver were so allowed to come upon the proceeds in the registry, they would, under the peculiar circumstances of the case, be left altogether without a remedy, inasmuch that the only other alternative would be to proceed against the owners individually; and such owners, in the present instance, were foreigners and residing abroad.

On the part of the bondholders — The application of the French law was denied, and it was contended, that the question in point of fact and in law resolved itself entirely and exclusively into a question of average, which the court had no jurisdiction to entertain under the circumstances of the case.

#### JUDGMENT.

DR. LUSHINGTON. The question in this case relates to a claim which is preferred by the owners or consignees of some \* silver, sold at Rio de Janeiro, in order to repair certain [ \* 489 ] damages sustained by the vessel whilst on her voyage from Lima to this country. This claim is preferred, not against the proceeds of the ship or the freight only, but also against a certain sum of money which has been paid into the registry, to meet a bond of bottomry upon the cargo. The claim is contested by the holders of three several bottomry bonds; and it has, I must say, been brought forward at a very late period in the suit. I do not, however, consider that the delay is alone sufficient to debar the claimants from their right of resorting to this court; because I apprehend that, until a final decree is actually made, the court is bound to consider every claim against any fund in court, however those funds may have been brought in. As far as my own experience extends, no claim of a similar description is to be found in the annals of this court; a circumstance which naturally induces me to consider with some carefulness whether the novelty of the claim be specious or real. In other words, whether, although novel in appearance, it does not rest upon some recognized principles by which other claims have been decided. What, then, is the true character of the claim in question? It is a claim on behalf of the owners of certain property, shipped on board the vessel, and applied to relieve the ship's necessities, and to enable her to complete her voyage. In the case of *The Gratitude*,<sup>1</sup> Lord Stowell has held, that property so sacrificed is to be considered as the proper subject of general average; and Lord Tenterden, in his

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<sup>1</sup> [3 C. Rob. 240.]

book on Shipping, lays down the same doctrine in the following words:—“It is the same thing to the merchant, whose [ \* 490 ] goods are taken from his control, whether they are sold \* or thrown into the sea; in either case, it is a sacrifice submitted to by him for the benefit of all, and which ought, therefore, to be made good by general contribution,” that is, by general average. If this be so, and if, upon the authority of my Lord Stowell, thus confirmed by my Lord Tenterden, I am to consider this claim as a subject of general average, two considerations immediately suggest themselves:—First, whether I have any jurisdiction at all over questions of general average? and, secondly, whether I could satisfactorily exercise such a jurisdiction, under the circumstances of the case? The absence of any precedent, where the court has exercised the jurisdiction, is, of itself, a strong *prima facie* proof that I have no authority to entertain the question at all; and I am the more strongly inclined to this opinion by the further consideration that, in all cases of average, it is essential that the tribunal which is to adjust it should have the power to compel all parties interested to come in and pay their quota. I possess no such power; and if I could not bring all parties interested before the court, I could not adjust a general average, which is a proportionate contribution by all. The authority of Mr. Justice Story, in the case which was cited in the argument, deservedly high as it is, cannot affect my decision in the present instance; and for this reason, that the Courts of Admiralty in the United States and in our American provinces have been allowed to exercise a jurisdiction which this court, after the decisions in the courts of common law, would not venture to entertain.<sup>1</sup> Again; the case which was before Mr. Justice Story was widely different in its circumstances from the present case. In that case, the whole proceeds of the ship, cargo, and freight were [ \* 491 ] in \* the registry of the Admiralty Court at the time. In this case, the court has in its possession the proceeds of the ship and the balance of the freight, after payment of wages and divers demands, and a sum of 1,550*l.*, part of the value of the cargo, specially brought in to answer the demand of one bondholder against the cargo; his bond being the only bond that does attach upon the cargo. What the amount of the remainder of the cargo may be, I

<sup>1</sup> [The grant of “admiralty and maritime jurisdiction,” in the Constitution of the United States, is not limited to that of the High Court of Admiralty in England. *De Lovio & Boit*, 2 Gall. 398; *The Genessee Chief*, 12 How. 443; *Fretz v. Bull*, 12 How. 466; *Waring v. Clarke*, 5 How. 441; *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 344; *The Huntress*, 1 Davies, 93, note; *Davis v. New Brig*, *Id.* 477.]

know not; but this I do know, that it is not in the hands of the court, and it has not been even suggested in the argument that the court is possessed of any power or authority to compel it to be brought in, in order to render it amenable to general contribution, that is, to a general average. Under such a state of circumstances, to decree this demand to be paid out of the funds in court would not be general average, or any thing like it. General average, as I have already observed, is a proportionate contribution by all, and that could not be accomplished on the present occasion. I have considered the question, thus far, upon the principle that, in acceding to the prayer made on behalf of the owners of this silver, I should not be causing justice to be done in the way of general average. I must now refer to another consideration, upon which it is contended that a decree in conformity with the prayer may be supported, namely, that the owners of the silver have a lien upon the property prior to all the bottomry bonds, and, indeed, to all other demands whatever. According to the law of this court, I conceive that such a proposition cannot be sustained for one single moment. By that law wages only, and some few demands of equal urgency, can take precedence of bonds of bottomry. But it is said that this lien is given \* to them by the law of France, and that the application of [ \* 492 ] the silver and the bottomry contracts are to be considered as French transactions, and are to be governed by the law of France. Now, independently of all other considerations, as, for instance, whether it would or would not be a very mischievous principle to introduce, can I administer any other law than the law of this court? I apprehend not. The principle which obtains, not only in this country, but in all other countries where principle is understood, is, that whoever sues in a court of law, be he foreigner or native, can only claim that remedy which the court in which he sues is in the habit of giving to all suitors, according to the law it usually administers. If he proves his case, to that remedy he is entitled. It is very important to bear in mind the difference between construing a contract according to foreign law, and administering a remedy by foreign law. But how stand the facts of the present case in reference to the proposition in question? The vessel is a Peruvian vessel, and all the transactions took place at Rio de Janeiro. Rio, therefore, is the *locus contractus*, if locality has any bearing upon the question. Again, with respect to the parties interested. Some of the parties, it is true, are French; but other parties to the bonds, and some of the owners of the cargo, are not French. It would, I conceive, be difficult to hold that those persons were bound by this law at all. Still more difficult would it be to maintain that



I could dispose of a sum of money, paid into the registry of this court for a specific purpose, and divert it to a totally different appropriation, without the consent of the persons who paid it in. These difficulties, I confess, are to my judgment wholly incapable of solution.

[ \*493 ] \* For the reasons to which I have adverted, I cannot assent to the proposition, that, because these bonds are drawn up in the French form and by the French consul, and some of the parties advancing the money are Frenchmen, the French law should govern, not the bonds only, but all the other transactions connected with the ship. Such a principle, if admitted, would furnish a dangerous precedent in all future questions of bottomry, and would involve the court in the greatest difficulties; because, in every case where a bond of bottomry was given abroad, I should have to examine, in the first instance, into the form of the contract, and determine, according to such form, by what law the transactions ought to be regulated. Bonds in the English form, it is well known, are sent out from England to all parts of the world; and these bonds are copied from the form appended to Lord Tenterden's treatise on Shipping, or from some other work of the same description. Was it ever known to be contended, that such bonds were to be construed by the law of England, according to whose form they were drawn, and not by the law of the country in which they were to be enforced? It is unnecessary for me to pursue the inquiry, how far the law of France, as stated by the owners of the cargo, is correctly stated in the present instance. However clearly that law might be demonstrated, it could not be applied to the circumstances of this case. I am perfectly satisfied, looking to the whole of the proceedings, that, as regards these several bottomry transactions, the contracts were entered into, not with a view to the law of Rio, which is the *lex loci contractus*, nor with a view to the law of France, which governs the form of the bond, but with a view to the law [ \*494 ] of \* England, where the contracts were to be carried into effect.

Before I leave this case, I must add one further observation upon the practical effect of the principle which the owners of the silver have sought to introduce, and which, they have stated, is a principle recognized and adopted in the law of France. If such a principle were generally admitted into the maritime law of Europe, it would, I conceive, be attended with consequences very little for the advantage of the shipping interest of this or any other country of the world. If such were to be the law, however urgent the necessity, however pressing the demand, merchants, when applied to for ad-

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The Charlotte Wylie. 2 W. Robb.

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vances, would say — We will not advance money at all, because the property upon which it is lent may be taken for claims we know nothing about. Or, if they did run the risk, they would require a much larger premium than is demanded under the existing state of the law. It has been said that, by this decision, the present claimants will be left without a remedy. If this be so, certainly the law would appear to leave a case of great apparent equity without redress. I cannot, however, for a moment conceive that, because I cannot interfere, such will be the case with regard to other tribunals. It may, indeed, possibly happen, that in this case, as sometimes happens in other cases, the right of action may be useless; that the owners of the vessel may be abroad, and not within the jurisdiction of the courts of common law, or that such owners are bankrupts or insolvent. Such may, by possibility, be the case in the present instance; but that is not a circumstance which would give me a jurisdiction to interfere. For all these reasons, I am clearly of opinion that it is impossible to lend the \*authority of [ \*495 ] the court to satisfy the demand of the owner of the silver out of the funds which are in the hands of the court. I must, therefore, reject this petition, and with costs.

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THE CHARLOTTE WYLIE,<sup>1</sup> Rands.

November 11, 1846.

The commander and crew of a vessel of war, upon the African station, held to be entitled to a salvage remuneration for putting a sailing-master and two seamen on board a homeward bound merchant vessel to assist in navigating the vessel, the master and one of the mariners of the merchant vessel being invalid with fever, and incapable of discharging the duties on board.<sup>2</sup>

Deductions claimed by the owners for the value of the ship and cargo on account of freight, primage, and insurance, disallowed.

THIS was a cause of salvage, promoted by the officers and crew of H. M. S. Cygnet, for services rendered to this vessel under the following circumstances :—

The vessel, it appeared, was proceeding on her homeward voyage

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<sup>1</sup> [S. C. 5 Notes of Cases, 4.]

<sup>2</sup> [As to the right of king's ships to salvage, see *The Mary Ann*, 1 Hagg. Ad. R. 158, note.]

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The Charlotte Wylie. 2 W. Rob.

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to this country from the coast of Africa, where the master and one of the seamen were seized with fever, and a signal of distress was hoisted. Upon going alongside, the commander of The Cygnet immediately took out the master and the sick seaman, and put his gunner and three of the crew of The Cygnet on board; and by their assistance The Charlotte Wylie was navigated to Prince's Island, The Cygnet occasionally towing. At Prince's Island Mr. Collier, the sailing-master of The Cygnet, accompanied by two of the seamen, went on board The Charlotte Wylie; and Mr. Collier took the command of the vessel, and brought her in safety to England.

The defence on the part of the owners was, that the mate was quite competent to have brought the ship home, and that the services of Mr. Collier were unnecessary. That in point of fact Mr. Collier was put on board by the commander of The Cygnet for the purpose of securing a passage to England, where he was coming for the recovery of his health, and not from a conviction that his advice and assistance were requisite for the safe navigation of the vessel.

[ \*496 ] That \*the two seamen who accompanied him on board were discharged from The Cygnet, and were duly entered on the books of The Charlotte Wylie, and received their pay as seamen of that vessel,—consequently they could not claim in the capacity of salvors.

The case was argued by

*Queen's Advocate* and *Addams*, for the salvors.

*Harding* and *Bayford*, for the owners.

#### JUDGMENT.

DR. LUSHINGTON. It is now admitted by the learned council who have argued this case on behalf of the owners of the ship and cargo, that a salvage service has been rendered. The question, therefore, which I have to determine is, what is the compensation to be awarded to the salvors; and, in order to ascertain the amount of that compensation, it is necessary that the court should have before it some *constat* of the value of the property which has been saved. Where any dispute arises as to the value of the property itself, the ordinary and proper course of proceeding is to take out a commission of appraisement; where there is no dispute as to the value of the property, and where the question is not a question of fact, but a question of law, namely, whether the owners are entitled to make certain deductions, the commission of appraisement is unnecessary. In this case a preliminary question arises, not upon the fact, but upon the law,—

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The Charlotte Wylie. 2 W. Rob.

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whether certain deductions from the admitted value of the ship and cargo can be legally made by the owners. The deductions in question amount to the sum of 590*l.*; and these deductions are claimed by the owners for freight, primage, and insurance. With \*respect to the primage and insurance, I have no hesitation [ \*497 ] in deciding that the deduction cannot be allowed. With respect to the freight, I am also of opinion that the deduction must be disallowed; and for this reason, that the claim of the salvors extends over the ship, cargo, and freight, and they are entitled to have the whole value of these properly stated. Upon the present occasion no dispute is raised between the owners of the ship and the owners of the cargo; and if the freight be deducted from the value of the cargo, it must be taken afterwards as a separate item, upon which the court must decree salvage. This mode of proceeding, it is obvious, would be attended with no advantages to any of the parties concerned. I shall therefore assume the value of the ship and cargo together as amounting to the sum of 1,300*l.*; and upon this assumption I will now proceed to consider what are the undisputed facts in this case. It is admitted, in the first place, that whilst this vessel was on her homeward voyage from Africa to this country, the master and one of the seamen were taken ill; that a signal of distress was hoisted, and that the master and the seaman were removed on board The Cygnet; that the seaman died on board that vessel, and that the master, long after the two vessels had parted, recovered from a protracted and very dangerous illness. It is further admitted, that the gunner of The Cygnet and three of the mariners were put on board The Charlotte Wylie, and that whilst the two vessels were in company on their way to Prince's Island, The Cygnet took The Charlotte Wylie in tow. A third and more important admission is, that upon the arrival of the vessels at Prince's Island, Mr. Collier, the sailing-master of The Cygnet, was put on board The Charlotte Wylie to conduct her to England; \* and that two of the crew [ \*498 ] of The Cygnet accompanied him on board, and were put upon the ship's books, and assisted in navigating the vessel.

It has been contended in the argument of the case, that the two seamen who went on board at Prince's Island, having signed the ship's articles, must be considered as part of the crew of the vessel, and could not be entitled to claim as salvors. It would be raising a question requiring great consideration for no purpose if I were to attempt to decide the point, whether these men were ever discharged from The Cygnet, and whether the signing of the ship's articles was or was not a legal act: it is a question altogether unimportant to the real issue in the cause; because the distribution of the salvage remu-

neration in the present instance must be governed by other and different rules from ordinary salvage, namely, by act of parliament and the proclamations of her Majesty in council. I shall therefore pass on to the next objection which is raised by the owners, that the towing of The Charlotte Wylie, and the services of the gunner and the three seamen who were put on board in the first instance, were superfluous and unnecessary. This, again, is a small point in the case, and has no material bearing upon the issue in the cause. Were it necessary to supply an answer to this objection, such answer, I think, might be deduced from the fact, that the number of the original crew of The Charlotte Wylie had been diminished by the absence of the master and the seaman who were taken on board The Cygnet; and the probability is,—I do not say certainty,—that some inconvenience and some difficulty, if not danger, might have been experienced in navigating the vessel by the reduction in the original complement of hands. But this, I repeat, is a small part of the service, and no great stress has been laid upon it by the counsel for the salvors; indeed, it is admitted by them, that the towage was principally resorted to, to accelerate the movements of The Charlotte Wylie, and to save, what is always valuable, the time of her Majesty's ship. I now come to a far more important objection, which has been raised against the claim of the alleged salvors, namely, that the mate was fully competent to have brought this vessel home to England, and that the sending the sailing-master on board to conduct the vessel was altogether unnecessary. This branch of the case must depend upon two questions of fact: first, whether or not the crew were sufficient for the purpose of navigating the vessel to England; and, secondly, whether the mate was sufficiently skilled in navigation to discharge, without assistance, the functions of master with safety to the lives and property on board the vessel. Independently of these questions of fact, let us for a moment consider how stand the probabilities of the case in reference to this averment. It is, I apprehend, notorious that it forms part of the instructions of every one of her Majesty's vessels, that they shall render assistance to British vessels in distress. On the coast of Africa in particular, where, in consequence of the illness of the crews from the maladies which prevail in that region, British vessels are more frequently in comparative danger and distress from a shortness of hands,—it forms a part of the duty of commanders of ships on that station to follow out these instructions, and to render their assistance. But have they any inducement so to do, unless the circumstances of the case imperatively require it? I conceive not; and for this obvious reason, [ \* 500 ] that on the coast of Africa it is absolutely necessary, for \* the

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The Charlotte Wylie. 2 W. Rob.

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efficiency of her Majesty's ships engaged in the suppression of the slave trade, that the commanders should retain on board their own vessels their full complement of men. They are exposed to a two-fold danger,—one, the danger of sickness from the climate; the other, which occurs frequently, from the weakening and diminishing the number of the crew by sending them with prizes to various ports;—it is not, therefore, to be supposed, that, under ordinary circumstances, any one of her Majesty's officers on that station would be willing or desirous of diminishing his crew unnecessarily.

It has been suggested by the learned counsel who argued this case for the owners, that Captain Layton, the commander of The Cygnet, might possibly have been influenced by two considerations: the one, his own benefit and advantage in effecting a salvage service; the other, his desire of securing a homeward passage for Mr. Collier, who was ill at the time, and was returning to England for the recovery of his health. Without the strongest and most conclusive proof arising from all the facts of the case, I should be most reluctant to impute to any officer in her Majesty's service that he was influenced, by any motive of private advantage to himself, to disregard his duty. I could not presume such an inference; and when I consider the trifling amount of the reward that can accrue to Captain Layton from any salvage decreed under the circumstances of this case, it is clear that he would have exposed himself to the inconvenience of losing his sailing-master,—one of the most important persons in the navigation of his vessel,—without any prospect of adequate pecuniary recompense. With respect to the health of Mr. Collier, I am satisfied, from the statement of Dr. M'Cree, that he was \*an able [ \*501 ] and efficient officer, though suffering under temporary indisposition.

I must now return to the question of fact, whether the mate was or was not competent to conduct the vessel safely home without assistance. As regards the capacity of the mate there has been a great deal of swearing in the cause. If the testimony of the mate himself was *exceptione major*, it would go far to determine the question; for he unquestionably speaks to his own capacity in very decided terms. Looking, however, to the contents of his affidavit, it is apparent that he is a person utterly regardless of the facts to which he is deposing; for he swears to the truth of facts which were utterly beyond his own knowledge, and which it is impossible he could have any means of knowing. But it was said, and the argument was strongly pressed, that when the vessel arrived off St. Michael's, Mr. Collier told the mate that if he did not get better he should land there; and asked him whether in that case he, the mate, could take The Char-



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The Charlotte Wylie. 2 W. Rob.

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lotte Wylie home, and that the mate replied he was quite able and willing to do so.

This averment, it is said, is uncontradicted, and must, therefore, be taken as an admitted fact in the case. Conceding that position, what is the value of the fact itself? It is this, that the question was asked by Mr. Collier under the impression that he should be compelled to land at St. Michael's, and the answer of the mate is his own testimony to his own capacity. The very fact that the question was asked by Mr. Collier, in some measure detracts from the testimony in question; inasmuch that it demonstrates that Mr. Collier, although he had been sailing in com-

pany with the mate, had not ascertained, as a matter of [ \* 502 ] fact, that he was capable of taking charge of \* the ship; if the mate had been so competent, the fact, I conceive, must have been known to Mr. Collier. I do not think it necessary to follow up this question more minutely. I rest my decision more immediately upon the consideration, that in all probability additional hands were necessary for the safe navigation of the vessel. It is not to be supposed that a merchant vessel would take more hands on board than were absolutely necessary for the working of the ship. If, therefore, the original crew of The Charlotte Wylie consisted of the master and the seaman Smith and seven others, by the withdrawal of the master and the seaman the ship's complement of hands was reduced to seven; and not only so, but there was the loss of by far the most important person on board, namely, the master himself.

It has been asked from what danger this vessel was rescued. I answer, from the danger of a long navigation, with a deficient crew and a probably deficient master. I am of opinion, that the officers and crew of H. M. S. The Cygnet are entitled to a salvage remuneration for their services; and I think I shall meet the justice of the case in allotting the sum of 150*l.*, with their costs.

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The Atlas. 2 W. Rob.

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THE ATLAS.<sup>1</sup>

November 21, 1846.

Damage pronounced for against a vessel with a licensed pilot in charge, compulsorily taken on board.

Blame of the collision solely imputed to the crew by the pilot in charge, and distinctly denied by the crew.

Court pronounced that the pilot was in some degree in fault, and that the evidence, under the circumstances, was not sufficient to bring the charge home to the crew.

Owners of the damaging vessel dismissed from the responsibility of the damage.

In this case The Picolo Oscar, an Austrian brig, belonging to the port of Trieste, whilst at anchor in Falmouth Harbor was run into by The Atlas upon the 24th of February last, and was so much damaged that she was obliged to be run ashore and unladen for the purpose of repairs. The Atlas was in charge of a licensed pilot at the time, compulsorily taken on \*board; and, the [ \* 503 ] damage being admitted, the question was confined to the comparative credit to be given to the affidavits in the cause.

The pilot in charge of The Atlas distinctly swore, that he gave the orders to drop the anchor in time, and the collision was occasioned by a delay on the part of the crew in carrying those orders into effect.

The crew, on the other hand, as positively denied that any orders were given by the pilot.

The case was argued before Trinity Masters by

*Addams and Robinson* for The Atlas.

*Bayford and Phillimore* for The Picolo Oscar.

## JUDGMENT.

Dr. LUSHINGTON. Gentlemen — No doubt can be entertained that the damage in this case was occasioned by the default or negligence of some person or persons on board The Atlas, and was not caused through any failure on the part of the crew of The Picolo Oscar.

*Primâ facie*, therefore, the owners of the Austrian vessel (independent of all municipal regulations) are entitled to be indemnified by the owners of The Atlas for the loss which they have sustained. In the

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<sup>1</sup> [S. C. 5 Notes of Cases, 50.]

course of the argument some observations were thrown out by the learned counsel for The Atlas, with respect to the manner in which the case had been conducted on behalf of The Picolo Oscar. My opinion is, that the owners of that vessel were perfectly entitled to bring forward their case as they have done. They state generally, that they were at anchor, and properly moored; and that The Atlas came into the harbor, and in making her preparations for anchoring, ran into The Picolo Oscar, and did the damage in question.

[ \* 504 ] \* I do not conceive that they were bound, as suggested, to set forth more explicitly the nature of the damage, or to specify with more minuteness the manner in which it was occasioned. Again, with respect to the imputed delay in bringing this case to a hearing, the blame of such delay, if any, in my judgment, rests with the owners of The Atlas themselves. The answer to the act on petition should, I conceive, have confessed in the first instance, that the damage was occasioned by neglect; and should then have gone on to allege, that such neglect was exclusively the neglect of the pilot who was in charge of The Atlas, and was not in any degree participated in by the crew of that vessel. If this course had been adopted, the affidavits might have been taken immediately, and the point in issue might have been at once brought to a decision. I now come to the real ground of defence which is set up by The Atlas; and I must here repeat, what I have already stated in former cases, that where the defence alleges that a collision was occasioned by the exclusive negligence or default of the pilot in charge, the *onus* of proving that fact rests with the vessel setting up the defence. The propriety and justice of this principle is obvious upon two distinct reasons: First, that, according to every dictate of common sense, the persons on board the vessel which has received the damage cannot know with any accuracy what is done on board the damaging vessel; secondly, that the persons on board the vessel which sets up the defence must or ought to know whether the collision was occasioned by the default of the pilot or of the crew. Acting upon this principle in the present instance, I will frame the question which I shall have to put to you in the following form: Have the owners of The Atlas esta-

[ \* 505 ] blished to your satisfaction, that this \* collision did not arise from any default or negligence of their own crew?

I am well aware of the difficulty which attends the solution of this question — a difficulty which arises from the strong and positive contradiction between the affidavit of the pilot who was in charge of The Atlas and the affidavits of the crew of that vessel. On the one hand it is alleged, that the pilot gave the order in time for letting the anchor drop, but the crew disobeyed it. On the other hand, there is

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The Atlas. 2 W. Rob.

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a general denial that any such order was given. The first averment rests upon the single and unsupported testimony of the pilot alone, and he is subject to all those observations upon his credibility which have been so strongly urged by Dr. Addams and Dr. Robinson. He may, as suggested, be liable to an action; he may be liable to the forfeiture of his bond; he may be subject to dismissal. For all these reasons, he has undoubtedly the strongest inducement to depose in exculpation of himself. On the other hand, the master and crew of The Atlas are not in a much better position. They have not only the interest of their employers at stake, but their own individual interest would undoubtedly lead them to swear that they were not to blame. As regards the probability of the case, it is difficult to say that there is *à priori* any decided preponderance on the one side or the other. The probability lies either way; it is just as consistent with probability that the pilot should discharge his duty with propriety as the crew; again, it is equally consistent with probability that either party should have neglected their duty in bringing this vessel properly to an anchor.

The question, then, which I shall submit to your consideration is this: Are you of opinion that, under the circumstances of the case, the crew of The Atlas were not to blame?

After consultation with the Trinity Masters, the learned judge proceeded to observe:

Upon the first question in this case there neither has been nor could be any controversy, namely, that the damage sustained by The Picolo Oscar was occasioned by the negligence or incapacity of some person or persons on board The Atlas. Upon the second point, the gentlemen by whom I have been assisted are of opinion, that some blame is imputable to the pilot who was in charge of that vessel. With respect to the third point, whether the master or any of the crew of The Atlas shared in that culpability or not, we are all of opinion that there is not enough evidence to satisfy us that any blame is imputable to them. I must, therefore, dismiss the suit, but I shall give no costs.

THE SERINGAPATAM.<sup>1</sup>

November 27, 1846.

A vessel close hauled on the larboard tack, meeting another vessel with the wind free, at night, not justified in starboarding her helm where there is a probability of the two vessels coming into collision.

Both vessels pronounced in default, the other vessel not having kept a good look-out, and not having ported her helm in time.

In this case The Harriett, a Danish vessel of 445 tons burden, whilst upon a voyage from St. Croix to Copenhagen with a cargo of colonial produce, was run down off Beachy Head by The Seringapatam, an outward bound East Indiaman, upon the 26th of April last.

It was stated on behalf of The Harriett, that she was proceeding on the larboard tack up channel at the time, close hauled, her course lying E. and by S., and the wind being N. E. by N. and N. N. E.

That The Seringapatam was proceeding down channel, [ \* 507 ] \* steering W. N. W., and sailing with the wind free at the rate of about nine knots per hour. That The Seringapatam, when first descried, was about three points to the leeward of The Harriett, and distant about four cables' length. That as The Seringapatam approached, The Harriett starboarded her helm, and The Seringapatam, instead of keeping her course or bearing up in time, ported her helm at the last moment, and ran into The Harriett on the larboard side, abaft the forechains, causing the bark to fill, and compelling the crew, for the preservation of their lives, to take refuge on board The Seringapatam. That a good look-out was kept, and the measures adopted by The Harriett were proper and seamanlike, under the circumstances of the case; and the collision was solely imputable to The Seringapatam, in not keeping a good look-out, and not porting her helm in the first instance.

On the part of The Seringapatam it was alleged — That the wind was N. half W.; that a good and proper look-out was kept on board The Seringapatam, and that the collision was occasioned by the want of skill and mismanagement of The Harriett, in putting her helm a-starboard; that, according to the Trinity House regulations, both vessels, under the circumstances of the case, were bound to have ported their helm.

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<sup>1</sup> [S. C. 5 Notes of Cases, 61; reported again 3 W. Rob. 38.]

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The Seringapatam. 2 W. Rob.

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The case was argued before Trinity Masters by

*Queen's Advocate* and *Robinson*, for The Harriett.

*Addams* and *Deane*, for The Seringapatam.

JUDGMENT.

DR. LUSHINGTON. Gentlemen — It is admitted, in this case, that the course \* of The Harriett was E. by S., and [ \* 508 ] that The Seringapatam was steering a course W. N. W. With respect to the direction of the wind, the parties are at issue. On the part of The Harriett, it is alleged to have been N. E. by N. and N. N. E.; on the part of The Seringapatam, that it was N. half W. Without imputing to either party any intentional misrepresentation, we may, I think, with safety assume that the wind was somewhere between the two statements. Under this assumption, I shall submit to your consideration three questions, upon which, I apprehend, the decision in the case must eventually depend. First, did The Harriett adopt a right and prudent course in starboarding her helm; she being, according to her own statement, as close-hauled as she could be at the time? Secondly, did The Seringapatam act properly in putting her helm a-port? The third and most important question is, was there a good look-out on board The Seringapatam at the time when this collision took place? I confine this question to the conduct of The Seringapatam; because I am satisfied, in my own mind, that no reasonable doubt can be entertained that a good look-out was kept on board The Harriett, and that no blame whatever attaches to this vessel in this respect. If you shall be of opinion that there was a neglect of duty on the part of the crew of The Seringapatam, in not keeping a sufficient look-out, and that the helm of the vessel was not ported as soon as it might and ought to have been, however right may be the measure of porting the helm, it will not avail to protect the owners of The Seringapatam from the responsibility of the damage in the present instance.

On the part of The Harriett, you will observe, gentlemen, there is a distinct averment to the effect \* that she first saw [ \* 509 ] The Seringapatam at the distance of half a mile; is it not somewhat remarkable that, both in the evidence and in the pleadings on behalf of The Seringapatam, there is an absence of all specification as to the time and the distance at which The Harriett was first seen from The Seringapatam? The silence of The Seringapatam upon these points, it appears to me, is not undeserving of consideration.



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The Great Northern. 2 W. Rob.

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Gentlemen — It will be for you to consider whether, looking at all the circumstances of the case, there was a good look-out kept on board *The Seringapatam*; and whether, assuming the measure to have been rightly adopted, the helm of *The Seringapatam* was put to port at a sufficiently early period of time.

The *Trinity Masters* were of opinion that *The Harriett* did wrong in starboarding her helm; and that *The Seringapatam*, for want of a good look-out, did not port her helm in due time.

Court pronounced that the damages should be equally borne by both parties.

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THE GREAT NORTHERN,<sup>1</sup> Forrest.

December 1, 1846.

Construction of the Irish Bankrupt Act, 6 W. IV. c. 14.

Plea of the master, that the owners of the vessel were bankrupt, not brought within the provisions of the twenty-second section of the statute.

THIS was a suit for wages, promoted by the late master of this vessel, under the statute 7 & 8 Vict. c. 112. An appearance, under protest, was given by the mortgagee of the ship; and the defence to the action was rested upon the grounds:— 1st. That the owners of *The Great Northern* were not bankrupts or insolvents, within the provisions of the act 6 W. IV. c. 14; 2dly. That the act 7 [\* 510] & 8 Vict. \* did not apply, under the circumstances of the case; the wages in question having been earned antecedent to the time when the act came into operation.

For the mortgagee, *Addams* submitted — That the statute 7 & 8 Vict. had already received a judicial interpretation, in the case of *The Princess Royal*, and the effect of the decision in that case was, that masters of vessels were only entitled to resort to this court for their wages, when the owner has become bankrupt or insolvent within the strict legal interpretation of the term. In the present instance, the alleged bankruptcy of the owners was stated to be a

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<sup>1</sup> [S. C. 5 Notes of Cases, 71.]

bankruptcy under the statute 6 W. IV. c. 14, which applies to bankruptcies in Ireland; and this statute requires the observance of certain forms to constitute a bankruptcy under that act. The twenty-second section provides — “That the trader shall first file, in the office of the lord chancellor’s secretary of bankrupts, a declaration in writing, properly signed and attested, that he is insolvent or unable to meet his engagements; that this declaration shall then be inserted in the Dublin Gazette; and every such declaration shall, after the insertion of such advertisement, be an act of bankruptcy, committed by such trader at the time when such declaration was filed.” What follows? Why the section then goes on expressly to enact — “That no commission shall issue thereupon, unless it be issued out within two calendar months next after the insertion of such advertisement; and unless such advertisement shall have been inserted in the Dublin Gazette within eight days after the declaration was filed; and no docket shall be struck upon such an act of bankruptcy before the expiration of four days next after the insertion of such advertisement.” What are the \*facts of this case? Was [ \*511 ] any commission taken out within the two months, as prescribed by the act? No such thing. The only act done by the owners, to comply with the requisitions of the act, was the mere preliminary act of filing the declaration. This was filed upon the 12th of May, and no further act has since been done to complete the bankruptcy. It was perfectly obvious, that the circumstances of the case did not fall within the provisions of the twenty-second section of the statute, and that the owner was not a bankrupt within the strict legal meaning of the term; that a further objection to the master’s claim to sue in this cause was suggested by the fact, that the contract between the owners and the master was extinguished antecedent to the time when the statute 7 & 8 Vict. came into operation. The act did not receive the royal assent until the 5th September, 1844; and, according to the master’s statement, the wages were earned previous to September, 1843. Whatever wages, therefore, the master was entitled to receive, could only be recovered under the law as it existed at the time the wages were earned, namely, by a personal action against the owners with whom he had made his contract. That, although in the case of *The Repulse* the court had certainly laid it down that the statute 7 & 8 Vict. was, to some intent, retrospective in its operation, the fact in this case, that the contract between the master and the owner of the vessel was extinguished at the time the act of Victoria came into operation, furnished a strong difference between this case and the case of *The Repulse*.

For the master, *Bayford, contra*. That it was not necessary to establish a bankruptcy, under the act \*6 W. IV. It would be sufficient, for the purpose of bringing the case within the statute 7 & 8 Vict., to show that the owners of this vessel were at the present moment insolvent, in the legal acceptation of the term; that this was sufficiently evidenced in the declaration of the owners themselves, which had been filed in the office of the secretary of bankrupts; and as this was not only solemnly signed by the owners, but was formally attested, it was an instrument entitled to the highest consideration; that, in the circumstances of the case itself, there was nothing to militate against the decision already pronounced by the court in the case of *The Princess Royal*; and, as regarded the decision in *The Repulse*, although the circumstances of the two cases might, in some respects, be different, the observation laid down by the court, in the outset of its judgment, was in these words:—"The act in question is necessarily, in some respects, retrospective in its effects; inasmuch as it applies to contracts made between masters and owners antecedent to the passing of the act;" that this *dictum* had no exclusive reference to the case immediately before the court at the time, but was general in its import; and, as such, was fairly applicable to the claim set up by the late master of *The Great Northern* in the present instance.

#### JUDGMENT.

DR. LUSHINGTON. In this case the vessel was arrested at the suit of the master, under the provisions of the statute 7 & 8 Vict. c. 112. An appearance has been given under protest, on behalf of the mortgagee of the ship; and the protest is mainly rested upon the averments, that the owners of *The Great Northern* are not bankrupts or insolvents, in the strict legal acceptation of the term; [ \* 513 ] \* and, consequently, the master is not entitled to sue in this court, under the provisions of the recent act of parliament. In the case of *The Princess Royal*, which was cited by the learned counsel for the mortgagee, I have already decided that the true meaning and proper construction of the statute is, that, in order to establish the master's right to sue in this court, the owner must be a bankrupt or insolvent, not in the mere general acceptation of the term, that is, unable to discharge his pecuniary obligations, but must be so in the strict legal sense of the words.

From this decision it is not my intention to depart in the present instance; and the point which I have to determine is, how far the facts and circumstances of this case fairly fall within the principle of this decision. It is alleged, on behalf of the master, that a declaration

of insolvency was filed by the owners of The Great Northern about the 12th of May; that is, about five or six weeks before the period when the arrest of the vessel was made. The question arises, Does such a declaration *per se* constitute a bankruptcy under the act 6 Will. IV. c. 14? If it be so, the ship has been properly arrested, and the suit has been legally commenced by the master. If, on the contrary, the filing of such declaration was only an incipient step requiring something further to be done at a subsequent period to complete the bankruptcy, and if this further act has not been done, and cannot now be done, it is clear, in my opinion, that the owners of this vessel would not be bankrupts within the true intention of the bankruptcy law of Ireland. In order to solve this question, I must now refer to the 22d section of the act. This section provides in these words,—“That if any such trader shall file, in the \*office of the lord chancellor’s secretary of bankrupts, a [ \*514 ] declaration in writing, signed by such trader, and attested by an attorney or solicitor that he is insolvent,”—the word insolvent, I would here observe, is used, not in a technical, but a general sense,—“or unable to meet his engagements, the said secretary of bankrupts shall sign a memorandum that such declaration hath been filed, which memorandum shall be authority for the printer of the Dublin Gazette to insert an advertisement of such declaration therein; and every such declaration shall, after such advertisement inserted as aforesaid, be an act of bankruptcy committed by such trader, at the time when such declaration was filed.” What, now, according to the meaning of this section, is the effect of such a declaration being signed? The effect is distinctly stated and defined by the words of the act, namely, “that it amounts to an act of bankruptcy upon the part of the person so making the declaration.” Does this constitute a bankruptcy in the legal acceptation of the term? Most clearly not. There is, I apprehend, a very wide difference between a person being a bankrupt and committing an act of bankruptcy. The 22d section then proceeds to enact, “that no commission shall issue thereon unless it be sued out within two calendar months next after the insertion of such advertisement, and unless such advertisement shall have been inserted in the Dublin Gazette within eight days after such declaration was filed.” How far do the facts of this case establish a compliance with these further requisites provided in the 22d section?

According to the statement which is before me, and which statement is altogether uncontradicted, it appears that no act whatever was done by the \*owners of the vessel subsequent [ \*515 ] to the filing the declaration of insolvency. It is perfectly clear that no commission has been sued out within the two months

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The Gazelle. 2 W. Rob.

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specified by the statute ; and no such commission can by possibility be sued out now, the two months having expired. Under these circumstances, it is impossible for me to designate the owners of this vessel bankrupts under the act of parliament 4 Will. IV. With respect to the argument which was raised by the learned counsel for the master, that the declaration of the owners' insolvency was of itself sufficient to give the master a *persona standi* to proceed in the cause, I at once dispose of it in the observation, that the insolvency mentioned in the declaration is an insolvency, not in the technical, but general sense of the term. As I consider myself bound to adhere to the decision I have already given in the case of *The Princess Royal*, I must hold, that such an insolvency, if proved, would not be sufficient in the present instance. I must, therefore, come to the conclusion that the vessel has been illegally arrested, and that the protest of the mortgagee against any further proceedings in the cause must be sustained.

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### THE GAZELLE.<sup>1</sup>

December 17, 1846.

Steam-vessel proceeding at an improper speed upon a dark night condemned in the damage.

In this case *The Dispatch*, a schooner of eighty-eight tons burden, whilst on her voyage from Sunderland to Ipswich, laden with coals, was run into by *The Gazelle*, about ten miles to the southward of the Dudgeon Light, and was eventually sunk.

[ \*516 ] The statement of *The Dispatch* was, that she was \*close hauled on the starboard tack, and was proceeding at the rate of about three knots an hour, the wind blowing stiff, and the night being dark and thick, with rain. That seeing the approach of the steamer she hoisted a light, and hailed the steamer to port her helm, the schooner keeping her own course as she was bound to do. That the light was hoisted in sufficient time to enable the steamer to take the necessary measures to avoid the collision ; but the steamer continued her course at the rate of about nine knots an hour, and ported her helm only at the last moment, when the two vessels were close upon each other. That seeing a collision was inevitable, the schooner,

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<sup>1</sup> [5 Notes of Cases, 101.]

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The Gazelle. 2 W. Rob.

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in order to lighten the force of the blow, starboarded her helm, and immediately afterwards the steamer struck the schooner on her starboard bow with such force that she eventually filled and sunk, the crew getting on board the steamer. That the collision was entirely occasioned by the default of the steamer in not keeping a good look-out, and in proceeding upon such a night at the speed at which she was going. That she should have ported her helm sooner, and should have eased or stopped her engines in the first instance.

On the part of the steamer it was denied, that any hailing was heard from the schooner by the persons on board the steamer; and the defence was mainly rested upon the averment, that the two vessels were approaching each other upon a dark night, stem on, and, by the regulations laid down by the Trinity House, both vessels were bound to have ported their helms. That the schooner by her own admission put her helm a-starboard, and the collision was occasioned by her mismanagement and want of skill in so doing.

\* The case was argued before Trinity Masters by [ \*517 ]

*Jenner and Deane*, for the owners of *The Dispatch*.

*Addams and Phillimore*, for the owners of *The Gazelle*.

#### JUDGMENT.

DR. LUSHINGTON. Gentlemen—I must trouble you with a few observations with respect to the rules which have been laid down for the navigation of vessels by the Trinity House Board, in order that we may clearly understand what those rules are, and whether I have rightly comprehended them, or have been in error upon former occasions of this kind.

The first regulation is, that sailing vessels having the wind free shall give way to those on a wind; by the term giving way is meant, I apprehend, that they shall get out of the way by whatever measures are proper for the purpose, either by porting or starboarding the helm, as the occasion shall require. The next rule is, that when both vessels are going by the wind the vessel on the starboard tack shall keep her wind on, and the vessel on the larboard tack shall bear up, thereby passing each other on the larboard tack. In this case the two vessels, you perceive, are similarly situated; and the rule, it appears to me, is wisely framed to prevent either vessel from dodging from one side to the other, through misapprehension or doubt as to the course which the other vessel would pursue. It is next provided, that where both vessels have the wind large or a-beam they shall pass each other in the same way, namely, on the larboard side. This rule, I conceive,



was also framed for the purpose of avoiding uncertainty ; [ \*518 ] and in order to effect \*the purpose in both cases, it is necessary that the helm should be put a-port. So much for the regulations laid down by the Trinity House Board for the navigation of sailing vessels. I now come to another regulation which applies more exclusively to the conduct of steam-vessels ; and this rule is laid down to the following effect, that as all steam-vessels are to be considered as vessels navigating with a fair wind, they are bound to give way to vessels sailing on a wind on either tack. Where a steamer meets another steamer or a sailing vessel going large, when the two vessels are on different courses, and must necessarily pass each other so near that by continuing their respective courses there would be risk of their coming into collision, each vessel shall put her helm to port, so as to pass on the larboard side of each other : this last regulation, it is obvious, does not apply to the present case. The case which we are now considering is the case of a steam-vessel meeting a sailing vessel on a wind ; and in such a case it is an undoubted proposition, that the steamer is bound to give way whether the sailing vessel be upon the starboard or the larboard tack. What then is the meaning of the term, giving way ? I have already stated my own impression, that it means getting out of the way by any measure that the occasion may require ; and I am not aware of any expression that has ever fallen from any of the gentlemen by whom I have so often been assisted in these cases, that it means putting the helm to port under all circumstances. Let us now consider what are the circumstances under which this collision took place. The Dispatch, a schooner of eighty-eight tons, laden with coals, was proceeding on the starboard tack to the east, the wind being at the time, according to the admission of both parties in the suit, from S. and by [ \*519 ] \* W. to S. S. W. ; and it being further admitted by The Gazelle herself, that the wind was blowing stiff, and the weather dark and thick, with rain. The course of The Gazelle, according to her own statement, was N. N. W. half W., and she was proceeding at the rate of between nine and ten knots an hour. The statement of The Gazelle then goes on to aver, that the persons on board The Gazelle saw a light on the larboard bow, and the mate of The Gazelle ordered the steersman to port the helm, which was accordingly done ; and immediately afterwards the two vessels came into collision, the bowsprit of the schooner striking The Gazelle on the larboard rail, about ten feet before the paddle-box. According to this statement it would appear, that the moment a light was seen the helm of the steamer was put to port, and immediately afterwards the collision took place. This statement is not contradicted on the part

of The Dispatch ; but she states what I conceive to be an important ingredient in the case, and deserving of your consideration, that upon seeing The Gazelle closing upon her, she starboarded her helm, and hailed the steamer to put her helm a-port. With respect to the last averment, you will observe, that it is expressly denied on the part of The Gazelle that any hailing was heard from the schooner. Consequently, if any error was committed by the persons on board the schooner in so hailing the steamer, it was an error that could not have influenced the measures adopted by the steamer, and was not in any degree the cause of the collision. The first question then is, whether upon such a night, The Gazelle being in a part of the sea which is much frequented by colliers, it was consistent with prudence, and a due regard to the lives and property of others, that she should have been proceeding at the speed of \*between nine [ \* 520 ] and ten knots an hour? The next question is more peculiarly addressed to your nautical skill and experience, namely, whether as soon as the light was seen by the persons on board The Gazelle, the helm of that vessel should have been ported or a different measure should have been adopted,—in other words, whether the exhibition of the light did not convey such an intimation of the close proximity of another vessel as rendered it obligatory upon the steamer to ease or stop her engines, or put the helm at once to starboard or to port? If you shall be of opinion, that in any of these respects the steamer either did that which she ought not to have done, or omitted to do what she ought to have done,—in either case the owners of The Gazelle must be responsible to a certain extent for the damage in question. So much for the conduct of The Gazelle. With regard to the schooner, if you are of opinion, that the helm was put a-starboard improperly or before there was any necessity for so doing, and the adoption of that measure in any manner contributed to occasion the collision, the consequence in law must be, that both vessels are to blame, and the loss must be divided between them.

The *Trinity Masters* expressed their opinion, that the starboarding the helm of the schooner and the collision were simultaneous ; and that the schooner was exonerated from all blame. They were also of opinion, that the steamer acted imprudently in proceeding with so much speed under the circumstances of the case, and that she did not take the necessary measures to avoid the collision.

Damage pronounced for, with costs.

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The William. 2 W. Rob.

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[ \* 521 ]

\* THE WILLIAM.<sup>1</sup>

January 13, 1847.

By the strict rule of court, where a tender has been rejected and has afterwards been adjudged a sufficient tender, the salvors are liable to a condemnation in the costs.

The inclination of the court, however, is not to press the rule with rigidity in all cases.

Tender pronounced for, but without costs.

THIS was a claim for salvage, promoted by the owners and crews of two yawls belonging to Great Yarmouth, for services rendered to this vessel in getting her off the Scroly Sand upon the 7th of October last. The value of the ship, cargo, and freight was 3,820*l.*, and the services of the alleged salvors lasted about two hours and a half, the weather being fine at the time. A tender of 100*l.* was made by the owners, and the tender was rejected.

The case was argued by

*Queen's Advocate* and *Robinson* for the salvors.

*Jenner* and *Bayford* contra.

THE COURT upon the merits decided that the tender was sufficient; and in reference to the question of costs, as applying generally to this class of cases, the learned judge observed to the following effect: I entertain some difficulty with respect to the question of costs. As a general position of law, it is undoubtedly the rule of this court that salvors are liable to a condemnation in the costs where a tender has been rejected, and has afterwards been adjudged a sufficient tender. This rule has been framed not with a view to the punishment of the salvors, but as a matter of justice to the other parties in the suit; and in the practice of other courts I apprehend the principle of the rule is carried out to the fullest extent. I have considered with some care

how far in the proceedings of this court it is desirable that  
[ \* 522 ] this rule should be generally and uniformly applied. \* The result of the consideration is, that I should feel great reluctance in applying the rule with full rigidity in all cases; and for this reason, namely, that there is something loose and indefinite in the very nature of all salvage transactions, which renders it difficult for

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<sup>1</sup> [S. C. 5 Notes of Cases, 108.]

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The Tritonia. 2 W. Rob.

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the best constituted minds, when judging of their own merits, to determine with nicety the real value and extent of their services. Where a tender has been made which is upon the face of it so ample and so liberal as to put beyond doubt the propriety of its acceptance, the rule of the court must be applied in all its rigor. In the present case, although I am clearly of opinion that the tender ought to have been accepted, yet at the same time, looking at the value of the property and at all the circumstances of the case, I do not think I ought to deprive the salvors of all reward, which I should in effect do by condemning them in the costs of these proceedings. I do not consider that it would be for the interest of the public to strain the principle of law, with respect to costs, by so harsh an application of it under the circumstances of this case. In pronouncing, therefore, for the tender, I must decline to make any order as to costs.

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THE TRITONIA.<sup>1</sup>

*Motion.*

January 13, 1847.

Monition for an attachment refused, against a receiver of droits of admiralty under the act 9 & 10 Vict. c. 99, for refusing to give up the possession of a vessel which he had seized as derelict and retained until his claim for expenses had been settled.

In this case the court was moved to decree an attachment against a receiver of droits of admiralty, appointed under the act 9 & 10 Vict. c. 99, for refusing to give up the possession of a vessel under the following circumstances:—

It was stated in the proceedings in the case, that \*the [\* 523 ] vessel having ran ashore to the westward of Blakeney Point, was abandoned by her master and crew at 6 P. M. of the 18th December last; and was discovered on the bar of Blakeney Harbor, by some Wayborn fishermen, who had put off to her assistance. That in the course of the same morning the consignees of the cargo, hearing that the vessel was stranded, sent down a number of men for the purpose of getting her off. These men, in conjunction with the fishermen,

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<sup>1</sup> [S. C. 5 Notes of Cases 110, and Supp. p. 1.]

were occupied during the 19th and 20th in lightening the cargo of the ship, which consisted of railroad iron. That upon the 21st the vessel, having been sufficiently lightened, was towed off and carried into Blakeney by the assistance of a steam-tug belonging to the consignees of the cargo, where she was again taken possession of by the master, who was also a part owner. That during the afternoon of the 22d, S. P., who represented himself as deputy receiver of droits of admiralty, accompanied by a notary public, arrived at Blakeney, and claiming the ship as derelict, under the Wreck and Salvage Act, 9 & 10 Vict. c. 99, turned the master and crew out and took possession of her themselves. It was also further stated, that upon the 24th December the vessel was arrested under a warrant of this court, by the Wayborn fishermen, in a cause of salvage; and bail having been given, a *supersedeas* was issued; but that notwithstanding such *supersedeas*, the deputy receiver of droits refused to give up the vessel, and persisted in retaining his possession until certain demands, contained in an account delivered to the owners, were satisfied.

[ \* 524 ] Under these circumstances, *Addams* moved the \* court to decree an attachment against the receiver for a contempt, in refusing to obey the *supersedeas* of the court.

PER CURIAM.

What jurisdiction have I to interfere in this matter? The *supersedeas* which has been issued by the court is only to supersede the effect of its own warrant of arrest, which had been previously issued. If that *supersedeas* had been resisted, I would assuredly have attached the party; but the application in the present instance relates to a matter totally different. It is in its nature an application in a cause of possession, with which I have no power or authority to deal in the summary manner suggested. The act of parliament, 9 & 10 Vict., gives me no jurisdiction over the receivers of droits appointed under that statute; and if the party against whom this complaint is now made has been guilty of a dereliction of duty in seizing and retaining this vessel, the remedy of the owners must, in my opinion, be sought, either by a representation of the facts to the Lords of the Admiralty, or by bringing an action in a court of common law. I am clearly of opinion that I have no authority to interfere in the matter, and I must consequently refuse the motion.

A tender of 100*l.* was subsequently made in acts of court for the services of the fishermen. This tender was refused; and upon the

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The Tritonia. 2 W. Rob.

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10th day of May the cause for salvage came on for hearing, when the case was argued by

*Robinson and Jenner*, for the salvors.

\* *Addams and Twiss*, for the owners.

[ \* 525 ]

The answer to the act on petition, with a view of again bringing the conduct of the receiver of the droits of admiralty under the notice of the court, in the conclusion of the plea averred, " That on the afternoon of the 22d, whilst the schooner was lying at the quay with her remaining cargo under the care of the consignees, and her master being then in possession of her, Mr. S. Palmer, of Great Yarmouth, deputy receiver of droits, accompanied by a notary public, arrived at Blakeney, and by threats of certain penalties, under the act 9 & 10 Vict. c. 99, compelled the master to make an affidavit as to his having abandoned the vessel on the 18th December; and, on obtaining such affidavit, forcibly seized and took the schooner, with her cargo, out of the possession of the master, without any lawful warrant from the magistrate, as having been derelict. That the owners, being unable otherwise to recover possession of the vessel and cargo, have been compelled to pay Mr. S. Palmer 76*l.* 15*s.* 6*d.* to procure their release. That the principal salvors were the Blakeney fishermen and the steamboat. That the Sheringham fishermen had neither the means nor power of themselves to get her off or land her cargo; and that they were induced solely at the instance of Mr. Clark, without ever applying to the owners for any compensation, then and there on the spot to permit Mr. Clark to send off an admiralty warrant, and to institute this suit. That the Blakeney fishermen, fifty-eight in number, have received 150*l.* for their services, and her owners have agreed to receive 50*l.* for their services of the steamboat."

\* JUDGMENT.

[ \* 526 ]

DR. LUSHINGTON. It is no part of my duty, in the present instance, to take into consideration some of the circumstances which have been imported into the case, and which do not properly belong to the jurisdiction which I exercise. The only question which I have to decide is whether the sum of 100*l.*, which has been tendered, is a sufficient remuneration for the services which have been rendered to this ship and cargo. I have nothing to do with the conduct of Mr. Palmer; I have nothing to do with a receiver of droits appointed under the authority of an act of parliament. Whether he has demanded what is just or unjust, is not for this court to deter-



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The Tritonia. 2 W. Rob.

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mine. I stated upon a former occasion, and I did not expect to be called upon to repeat that opinion, that if Mr. Palmer had been guilty of a dereliction of his duty, in seizing and retaining this vessel, the complaint must be made to another tribunal competent to decide the case and to afford redress, and not to this court, which has no authority to entertain or any means of determining the question. I dismiss, therefore, altogether from my consideration the alleged misconduct of Mr. Palmer, as utterly irrelevant to the issue in the cause; and I also dismiss the attempt which has been made upon the present occasion to apologize for the introduction of this irrelevant matter, namely, that a petty sum of 76*l.* ought to be deducted from the whole value of the property, supposing Mr. Palmer was justified in his demand. The salvors, in my opinion, are entitled to be remunerated out of the whole value of the property, without reference to any thing which has been done by Mr. Palmer or any other person.

[ \* 527 ] \* What, then, are the facts of the case, as they are disclosed in the proceedings in the cause? The vessel, it appears, was laden with a heavy cargo of railroad iron, and was proceeding from Cardiff to Wells, when she was abandoned by her master and crew, upon the evening of the 18th of December last. The coast guard at Sheringham having conveyed to some fishermen of that place the tidings of the abandonment, a boat, manned with a crew of nineteen hands, was launched, and rowed (the state of the wind rendering it impossible to sail) towards the place where the derelict was reported to be; and, at half past five on the following morning, the vessel was discovered lying upon her larboard side, on Blakeney outer bank, striking heavily, and in a situation which it is admitted by the master himself, in his protest, to have been one of great danger. The salvors having so found the vessel, proceeded to render such assistance as, under existing circumstances, they could supply. The pumps being broken, they set to work, in the first instance, to bale out the water, and, according to the master's admission in the protest, she had, at the time of her abandonment, not less than five feet of water in her hold. They then sent (a very proper measure, in my opinion,) to inform the consignee of the cargo of the situation in which the vessel was placed; and that gentleman having dispatched a number of additional hands to assist in unloading the cargo, they continued, in coöperation with these persons, to unlade the vessel until the morning of the 21st, when, at 7, A. M., she was towed off by the assistance of a steamboat, and towed into Blakeney Harbor. A suggestion was raised in the argument, that these fishermen, without the assistance of the additional

[ \* 528 ] hands supplied by the \* consignee of the cargo, would have

been utterly incompetent to rescue the vessel and the whole of her cargo. That is a theoretical question, into which I do not think it necessary to enter. I shall look to the services which have been actually performed, and not to those which, by possibility, might have been required. Looking to those services, they do, I conceive, most satisfactorily establish a case of considerable merit upon the part of the salvors in the present instance. I think it an ingredient of merit, not of disparagement, that they allowed the Blakeney men to coöperate in unlading the cargo. I think, also, that this merit has been further enhanced by the prompt information conveyed to the consignee of the cargo respecting the situation of the ship, and the utter absence of any attempt to remain on board the vessel beyond the period during which their services were strictly requisite.

I am always desirous to hold out to salvors, whether the case be one of derelict or of simple salvage, the expediency of not standing by their strict rights, but to deliver over to the masters or owners, at the earliest moment in which it can be done with safety, the property of which they are in charge; provided always that the salvors, in the first instance, have adequate security for that reward to which they may be found ultimately entitled. I do not consider it necessary to discuss all those minor points which have been agitated in the pleadings, but which have, I think, wisely been omitted by the counsel on either side, in the argument of the case. It is sufficient to observe, that the service which has been performed is a meritorious service, entitling the salvors to a salvage remuneration. Through their instrumentality the vessel was \*light- [\* 529 ] ened, a sufficiency of the cargo was landed, and the remainder brought in safety into Blakeney Harbor. With regard to the arrest of the vessel by Mr. Clark, as agent for the salvors, I apprehend that every salvor is entitled, as a matter of right, to resort to this court, if he thinks fit so to do; and that he is not compelled to enter into a preliminary negotiation with the master or the owners of the ship and cargo. It may, under ordinary circumstances, be beneficial to himself and the owners that he should do so; but as a matter of right, especially in a case of derelict, the salvors are entitled to resort here to enforce their demands. In other words, the law entitles them to say: We will have the judgment of the High Court of Admiralty as to the extent of the remuneration which we ought to receive; we will not negotiate.

It has been suggested, that as the owners of the steamer are content to receive 50*l.* only as the remuneration for the assistance of their vessel, and as the Blakeney men have been satisfied by the

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The Hebe. 2 W. Rob.

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payment of 150*l.* for their services, the court must form, from these facts in the case, a criterion of the comparative value of the services rendered by the asserted salvors. I do not, in any measure, accede to this suggestion. I do not know why the sum of 50*l.* was given to the owners of the steamer; still less do I know upon what principle the Blakeney men have estimated their services. This, however, I do know, that they do not stand upon the same footing as the Sheringham fishermen; on the contrary, that as the latter persons first boarded this vessel, when she was a derelict and abandoned, they possess a title superior to that of the Blakeney men in every sense of the word. Under the circumstances of the case, then, looking [ \*530 ] at the season of the year when this service \* was rendered, looking, also, to the peril in which the vessel was placed, and remembering that she was a derelict, I am of opinion that the tender which has been made is not an adequate remuneration, and that I shall not exceed the justice of the case by allotting an additional 100*l.* Of course the costs must follow; and, if they fall heavily upon the owners, they have to blame themselves for introducing this mass of matter, which is wholly irrelevant with respect to Mr. Palmer and Mr. Clark.

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THE HEBE,<sup>1</sup> Mosey.

February 22, 1847.

Objections to the report of the registrar and merchants, in a case of damage by collision.

All the objections, with one exception, overruled.

Objection sustained, that the repairs of the damaged vessel were paid for, upon the 25th of January, 1845; and interest was allowed by the registrar to run only from the 15th of May, 1846, on which day the damage was pronounced for.

Report directed to be amended with respect to this item.

Each party to pay their own costs.

THE question in this case was raised upon the objections which were taken to the report of the registrar and merchants, in a cause of damage by collision.

The objections to the registrar's report, as set forth in the act on petition, were to the following effect: — That the collision took

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<sup>1</sup> [S. C. 5 Notes of Cases, 176.]

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place on the 3d December, 1844; that, after the collision, the schooner was assisted into Portsmouth, from whence, after having been repaired, she sailed for Yarmouth; that, shortly after the collision, G. P., the owner of the schooner, authorized Captain Clifton to proceed from Yarmouth to Portsmouth, to superintend the repairs; and that he proceeded there accordingly, and remained at Portsmouth until the completion of the repairs, namely, the 7th of February, 1845; that, in the account of damages and expenses submitted to the registrar and merchants, a claim for 22*l.* 1*s.* 6*d.*, for the expenses of the said Captain C., and of 21*l.* for his loss of time, was made; but that the registrar and merchants have disallowed the whole thereof, on the ground \* that Messrs. Gar- [ \* 531 ] rat & Gibbon, of Portsmouth, acted as the agents of the owner, the said G. P.; that the only manner in which Messrs. Garrat & Gibbon acted as agents was in advancing the money and discharging the bills for the repairs, and for which they made a charge of 11*l.* 0*s.* 9*d.*, being at the rate of two and a half per cent. on the amount of their advances; that the master of The Rose, in addition to being too unwell to attend to the repairs himself, was utterly incompetent to superintend the same, both of which facts were expressly called to the attention of the registrar and merchants; that the bills for the repairs, salvage of The Rose, and other expenses connected therewith, amounted to the sum of 408*l.* 18*s.* 2*d.*, vouchers for which were produced to the registrar and merchants, but that they have only allowed the sum of 391*l.* 2*s.* 9*d.*, without assigning any reason for such deduction; that, after the schooner arrived at Yarmouth, sundry work was done on her by shipwrights, caulkers, &c., at an expense of 5*l.* 3*s.* 9*d.*, but that the same has been disallowed by the registrar and merchants; that, at the time of the collision, there was a quantity of meat, grocery, and other provisions on board The Rose, which were stolen by some person or persons who boarded The Rose, the crew having been obliged, for the preservation of their lives, to leave the vessel; that the said provisions had been replaced, at an expense of 5*l.* 18*s.* 8*d.*; and that the expenses of the master and crew in Portsmouth, and of the master in travelling home to Yarmouth and back to Portsmouth, where the repairs were furnished, amounted to 4*l.* 14*s.*, the said two items making, with the sum of 1*l.* 4*s.* paid by the master for setting up the rigging, the sum of 13*l.* 16*s.* 8*d.*, but of which sum the registrar and merchants have only allowed \* 7*l.* 2*s.* 8*d.*; that a claim for demurrage, at the [ \* 532 ] rate of 2*l.* per diem during the detention of the vessel at Portsmouth, was submitted to the registrar and merchants, who refused to allow the same, and required that the books of the owner

of the said vessel should be produced for their inspection; that the said owner declined to produce his books, but tendered to the registrar and merchants an affidavit from himself, corroborated by another affidavit of a ship-owner at Yarmouth, stating that during the time of the vessel's detention at Portsmouth she might have made two voyages, with full cargoes of coals, between the North and Yarmouth, and would, in all probability, have earned a clear net profit of 56*l.*, or thereabouts, but that, nevertheless, the registrar and merchants only allowed the sum of 30*l.* for demurrage; that the whole of the bills for the repairs and other expenses connected with the collision (excepting the law expenses) were paid in January, 1845, notwithstanding which the registrar and merchants have only allowed interest on the amount rejected by them, computing from the 15th of May, 1846, on which day the decree pronouncing for the damage was made.

The case was argued by

*Jenner*, in support of the objections.

*Addams, contra.*

#### JUDGMENT.

DR. LUSHINGTON. The original cause, out of which this question arises, was a cause of damage by collision brought against this brig by the owners of the schooner *Rose*. The damage having been admitted, the amount was referred, in the usual form, to [ \* 533 ] the registrar and merchants. \* The report of the registrar and merchants has been brought in, and is objected to; and I will now proceed to consider and dispose of those objections in the order in which they have been argued by the learned counsel for *The Rose*. The first objection relates to a small disallowance which had been made by the registrar from the original sum claimed by the owner of *The Rose*, for the repairs of the vessel, and other incidental expenses arising out of the collision. The sum claimed amounts to 408*l.* 18*s.* 2*d.*, the sum which has been allowed is 391*l.* 2*s.* 7*d.* On the part of *The Rose* it has been admitted in the argument, that from the original sum so claimed 8*l.* 3*s.* 6*d.* may be fairly and properly deducted. The difference, therefore, upon which the first question is raised, is confined to the trifling balance of 9*l.* 12*s.* 11*d.* Now with respect to minor items in cases of this kind, the court will not enter into the *minutiæ* of the objections which are taken, nor will it inquire into the *minutiæ* of the reasons by which the judgment of the registrar and merchants has been influenced. The court has the opportu-

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nity of referring generally to the registrar and of ascertaining the principles upon which the report has been made out: when, then, I am informed, as in the present instance, that the difference arises from the registrar and merchants having considered some of the charges superfluous and others too high, I see no reason to doubt that their discretion was properly exercised. I am, therefore, of opinion that they were right in allowing the sum of 391*l.* 2*s.* 7*d.*, and that this primary objection must be overruled. The next objection arises upon a further disallowance made by the registrar and merchants of the sum of 43*l.* 1*s.* 6*d.*, charged for the expenses of Mr. Clifton in going down to Portsmouth, \*and for his remuneration in [ \*534 ] acting as the agent of the owner of The Rose, and superintending the repairs. It is to be noticed that in addition to this sum charged for the agency and expenses of Mr. Clifton, there is a further sum of 11*l.* 0*s.* 9*d.* also charged for agency, and stated to have been paid to Messrs. Garrat & Gibbon for their services to the ship. It is not clear in what way the vessel came into the hands of Messrs. Garrat & Gibbon as agents for The Rose. They do not appear to have been appointed by the owner in the first instance as his agents, although to a certain extent they became his agents in advancing money and in discharging bills for the repairs. The question then is, whether I can allow the sum charged for the agency of Mr. Clifton in addition to the sum which has been allowed by the registrar and merchants for the services of Messrs. Garrat & Gibbon. I am clearly of opinion that I cannot; and I conceive that it would be extremely onerous upon the owners of The Hebe if such cumulative agency charges were allowed. It has been said in reference to the employment of Mr. Clifton, that his services were rendered necessary by the illness of the master of The Rose, and also by the fact, that in addition to his illness the master was utterly incompetent to superintend the repairs. Assuming the fact to be so, the illness or incompetency of The Rose's master furnishes no reason for saddling the owners of The Hebe with the expenses incidental to his inefficiency. He was the servant of the owner of The Rose, and if he thinks fit to appoint in the person of Mr. Clifton a substitute to discharge the duties which properly belonged to the master of his own vessel, he must do so at his own cost. With respect, therefore, to this objection I have no hesitation in confirming this \*part [ \*535 ] of the report. With respect to the charges which have been disallowed for the journeys of the master from Portsmouth to Yarmouth and back, I am at a loss to comprehend upon what principle the expenses of these journeys can be saddled upon the owners of The Hebe. There is no ground, in my opinion, upon which these



charges can be substantiated, and consequently I confirm their disallowance.

With respect to the additional repairs which were done after the arrival of the vessel at Yarmouth, it would, I apprehend, be extremely difficult to ascertain, if it were necessary to do so, how far such repairs might have been occasioned during the voyage from Portsmouth; but it is wholly unnecessary for me to enter into any such consideration, because I am satisfied that all the necessary repairs ought to have been completed at once before the ship left Portsmouth. I have no hesitation, therefore, in saying that I fully concur with the registrar and merchants in their disallowance of this item in the accounts.

I now come to the question of demurrage; and certainly there is a very considerable difference between the claim which was originally asserted by the owner of The Rose upon this account and the sum to which the registrar and merchants consider him to be entitled. The owner of The Rose in the first instance claimed the sum of 134*l*. Objections being taken to the extravagance of this demand, the claim was subsequently lowered to the sum of 56*l*.; and this claim is now supported by the affidavit of Mr. Palmer, the owner, stating that during the period of the vessel's detention she might have made two voyages with full cargoes of coals between the North and Yarmouth, and would in all probability have earned a clear net profit of [ \*536 ] 56*l*. or thereabouts. The *ex parte* \*avermment thus made by

Mr. Palmer without the production of any vouchers to corroborate the statement, is not, I confess, evidence to satisfy me in the present instance. Mr. Palmer was called upon to produce his books, and show what the vessel had actually earned in such voyages upon former occasions. This he declined to do: probably he may have had sufficient reason for so declining. At the same time he must learn, that in choosing to rest his claim upon inferior evidence when better evidence might have been produced, he must take the consequences and inconveniences arising therefrom. The affidavit of Teasdel, the ship owner at Yarmouth, I dismiss at once with this observation, that the consideration is not what other vessels might have earned from the beginning of December, 1844, until the 10th of February, 1845, but what this particular vessel would, upon a fair calculation of all contingencies, have probably earned from the 4th of December, 1844, until the 25th of January, 1845.<sup>1</sup> Any calculation made for a more extended period of time has nothing to do with the ques-

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<sup>1</sup> [As to lost earnings, see *Williamson v. Barrett*, 13 How. 101.]

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tion. I see no reason, therefore, to disturb the report with reference to this item.

The last objection, to which I now come, is, it appears to me, entitled to far greater weight and consideration. As regards the indemnification of parties who have received the damage, the principle of law as heretofore laid down is this, that they are entitled to be fully and entirely indemnified for the injury they have sustained. In the courts of common law this principle has been so far carried out that they are held entitled to have new timber put in without the deduction of one third allowed to the underwriters in insurance cases. In this court, in the case of *The \* Gazelle*,<sup>1</sup> I myself [ \* 537 ] adopted the same principle; and I consider that the principle not only applies to the case of new materials substituted for old, but that it is to be fully carried out in all its points. In the present case, would this principle be so carried out by allowing interest for the money expended in the repairs only from the date of the decree? I conceive that it would not. The account of Messrs. Garrat & Gibbons for their disbursements in the repairs was paid upon the 25th of January, 1845. The money was therefore due to the owner upon that day, but according to this report the registrar and merchants have allowed the interest to run only from the 15th of May, 1846, upon which day the damage was pronounced for. I am bound, I repeat, to carry out in all its points the principle to which I have adverted. I must, therefore, hold that the interest in this case shall run from the 25th of January, 1845: if there had been any discount allowed for the repairs I should have taken that circumstance into consideration in forming my decision, but the contracts, it appears, were for ready money. The course which I shall adopt is this, I shall not refer the report back to the registrar and merchants, but direct the necessary alterations with respect to this item to be inserted at once; and as this is the only item that has been sustained in the objections, I shall make no order as to costs, but leave each party to pay their their own costs.

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<sup>1</sup> [2 W. Rob. 279.]

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The Gypsy King. 2 W. Rob.

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GYPSEY KING,<sup>1</sup> Campbell.

April 16, 1847.

Manner of catting the anchor, preparatory to bringing up a vessel at her anchorage ground, exclusively within the province of a licensed pilot in charge.

Averment of the owners of the damaged vessel, that the collision was occasioned by the anchor of the damaging vessel being improperly catted, and that the blame lay partly, if not entirely, with the crew, overruled; and the owners of the vessel charged with the damage, dismissed.

No costs given.

THIS was a collision, promoted against this vessel by the owners of the schooner The Highlander, for damage sustained in the river Clyde.

[ \* 538 ] \* The Highlander, it was stated, was bound from Glasgow to Rotterdam with a cargo of pig iron, and at half-past three P. M. of the 25th of April last was proceeding down the river Clyde, when, in consequence of the tide being far ebbcd, she took the ground towards the north side of the river, and opposite to Dunbarton Castle. That between eight and nine o'clock she floated off, and there not being sufficient wind to carry her through the current, the master let go the small bower anchor, and made fast the helm to the larboard side, giving her a taught sheer to the northward. That being so anchored, she rode with her bow down the river, immediately above the entrance to Dunbarton, leaving ample room for vessels to pass without interruption. That about half-past eight, and previous to the anchoring of the schooner, a light was hoisted on the larboard fore rigging, at about fourteen feet above the deck. That shortly afterwards a steam-tug was observed coming up the river, having three vessels in tow. That the said steam-tug and the said three vessels passed clear of The Highlander upon her larboard bow. That about ten P. M., the night not being dark, but there being sufficient light to enable vessels to see at a considerable distance, another steam-tug was also observed coming up the river with three vessels in tow. That the steam-tug and the two first vessels in tow passed clear of The Highlander on her larboard side, but the third vessel, The Gypsy King, struck The Highlander on her larboard bow, into which she drove her anchor, where it remained fast, such anchor neither having been hoisted on deck nor catted as proper and custom-

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<sup>1</sup> [S. C. 5 Notes of Cases, 282.]

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ary, but hanging over her bow under water. That the hole made in The Highlander's larboard bow admitted \* the water [ \* 539 ] with such rapidity, that the master, to prevent her from sinking in deep water, ran the vessel ashore opposite Dunbarton Castle, the water then being over cabin lockers and above the main hold deck. That the blame of the collision was solely imputable to The Gypsy King, and in no sort or degree to The Highlander, or to any one on board that vessel.

The answer of The Gypsy King in substance stated, that The Highlander being anchored in the deepest channel, the tide at the time being rather more than one half flood, the pilot on board the steam-tug immediately hailed the persons on board The Highlander to pay away her chain and shift her helm, for the purpose of giving The Highlander a sheer by the tide, out of the way of The Gypsy King; but that no notice was taken of such hailing. That in consequence thereof the rudder or keel of The Gypsy King caught the cable of The Highlander, bringing the bowsprit of The Gypsy King into contact with The Highlander's fore rigging, and causing the anchor of The Gypsy King to run into The Highlander's larboard bow. That the anchor of The Gypsy King was at the time properly catted to the cathead, and hanging by a stationary chain slipper over the bow of The Titan, and near to but not under water. That the said anchor was so hung in conformity with certain by-laws and regulations made by the parliamentary trustees of the river Clyde and harbor of Glasgow. That The Highlander was at the time in the charge of an unlicensed pilot, and riding by a small bower anchor only, such anchor unnecessarily lying in the deepest channel, the weather at the time being calm. That the collision was altogether attributable to the position in which \* the anchor and cable of The [ \* 540 ] Highlander were placed, and for her crew not having when hailed put away the chain and shifted her helm, which might easily have been effected. That a duly licensed pilot was on board and in charge of The Gypsy King at the time, under the by-laws and regulations aforesaid; and that all the directions and orders of the pilot were promptly and efficiently obeyed by the crew.

The case was argued on the merits, upon the 16th February, before Trinity Masters by

*Queen's Advocate and Robinson, for The Gypsy King.*

*Addams and Jenner, for The Highlander.*

The *Trinity Masters* were opinion that there was plenty of room for the three vessels to have passed, and that the accident was solely occasioned by the waving of The Gipsy King from the straight line. They were also of opinion that The Highlander, having been ashore, was entitled to be placed in the situation in which she was anchored, and that no blame attached to the persons on board that vessel. The Trinity Masters having retired, the point of law was mooted by the counsel for The Gipsy King, asserting the exemption of the owners from the responsibility upon the ground that The Gipsy King was at the time under the charge of a licensed pilot compulsorily taken on board, and that his orders were properly obeyed by the crew. It being late in the day, the judge postponed the hearing of the argument until the 22d of February, when the point of law was argued, and upon this day the court delivered its judgment.

[ \* 541 ]      \*JUDGMENT.

DR. LUSHINGTON. This cause was argued upon the merits in the month of February last, when the court was assisted by two of the elder brethren of the Trinity House. Upon that occasion, in proposing my questions to the Trinity Masters, I requested their opinion upon the two following points; first, whether there was sufficient space for The Gipsy King to have avoided the collision, if she had been properly navigated? secondly, whether The Highlander, the vessel proceeding in the cause, was or was not under the circumstances of the case, properly anchored in the deep of the channel where she was lying. In answer to the first question, the Trinity Masters delivered their opinion, that there was sufficient room for The Gipsy King to have avoided the collision. Upon the second point (taking a distinction between anchoring and mooring) they pronounced, that The Highlander was properly anchored, having anchored without mooring in the deep water channel for the purpose of stopping a tide, and that vessels were so allowed to remain at anchor by the by-laws of the river Clyde.

The result of the opinion thus expressed by the Trinity Masters was, in effect, to inculcate The Gipsy King as having occasioned the collision in question; and *prima facie* to saddle the owners with payment of the damage, unless they were, in point of law, exempted from such a consequence. An exemption from liability is now asserted on their behalf by the learned counsel who have argued their case; and the exemption is claimed upon the ground, that at the time of the collision in question, The Gipsy King was under the charge of a licensed pilot compulsorily taken on board;

[ \* 542 ] that the orders of such pilot were duly \*executed by the

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crew; and that whatever was done by The Gipse<sup>y</sup> King, was done under the entire superintendence and direction of the pilot. Upon referring to the statute 6 G. IV. c. 117, and to the 3 & 4 Vict. c. 118, and also to the rules and regulations for the navigation of the river Clyde, which are said to have been made in pursuance of those acts of parliament, it is, I think, most sufficiently established, that The Gipse<sup>y</sup> King was bound under a penalty to have taken a licensed pilot on board in the present instance. That she had such a pilot on board is not controverted. *A priori*, therefore, according to the doctrine I have heretofore laid down, the owners would be exonerated from liability for any damage done by collision with any other vessel, if such collision, under the circumstances, could be attributed to the pilot alone. This principle is not contested, but it is denied that it applies to the circumstances of the present case, inasmuch that the collision was occasioned; not by the sole default of the pilot in charge, but partly from acts improperly performed by the crew of The Gipse<sup>y</sup> King. The real question in issue, then, resolves itself into a question of fact; and the point which I have to determine is, whether the facts of the case bring this collision, as regards the liability of The Gipse<sup>y</sup> King, under the rule, that the pilot being solely to blame, the owners are altogether irresponsible; or whether the rule applies, that the blame of the pilot being shared by the crew of The Gipse<sup>y</sup> King, the responsibility is not taken away. Now I have, upon former occasions, already expressed my opinion, that a vessel in charge of a licensed pilot, whilst in tow of a steam-tug, is, under ordinary circumstances, to be considered as navigated by the pilot in charge. That if the course pursued by the steam-tug is in conformity with \* his directions, and a collision takes place, the pilot is [ \* 543 ] responsible, and not the owners of the vessel or of the steam-tug. If, on the contrary, the steamer disregarded the directions of the pilot, and the collision was occasioned by her misconduct, the owner of the ship would, in that case, be responsible, in this court, as for the acts of their servant; and they must seek their redress against the owners of the steam-tug, in some other form of action. In the present instance, if I correctly understand the argument, the blame of the collision is not ascribed to the steam-tug at all, neither is the conduct of the pilot solely or exclusively impugned. The case of the owners of The Highlander is, that the anchor of The Gipse<sup>y</sup> King having been improperly catted, the damage has arisen from the defeasance of a duty, for the performance of which the master and crew of The Gipse<sup>y</sup> King were solely or partly responsible. In order to establish this averment as an effectual bar to The Gipse<sup>y</sup> King's exemption from liability, three things must be proved.



1st. That the mode of catting the anchor on board The Gipse<sup>y</sup> King was improper.

2dly. That it was the cause of the collision that ensued.

3dly. That it was the act of the master or his substitute, and of the crew of The Gipse<sup>y</sup> King.

I regret that I had no opportunity of requesting the opinion of the Trinity Masters specifically upon this point in the case; but unfortunately it was not mooted until after they had left the court. I must, therefore, determine it by my own unassisted judgment; and my difficulty in so doing is, I must say, somewhat relieved by the consideration, that if the Trinity Masters had considered [ \* 544 ] that the master and \*crew of The Gipse<sup>y</sup> King were to blame in relation to the catting of the anchor, they would have stated it in delivering their opinion to the court. In order to elucidate this part of the case, I must now briefly refer to the pleadings in the case, and the evidence by which the respective statements are supported.

On the part of The Highlander it is averred, that The Gipse<sup>y</sup> King drove her anchor into the larboard bow of The Highlander; and that the hole made by the anchor admitted water so fast, that, in order to prevent her from sinking, she was, of necessity, run ashore. This averment is met by a counter-statement on the part of The Gipse<sup>y</sup> King, that the rudder of The Gipse<sup>y</sup> King caught the cable of The Highlander, bringing the bowsprit of The Gipse<sup>y</sup> King into contact with The Highlander's fore rigging, and causing the anchor of The Gipse<sup>y</sup> King to run into The Highlander's larboard bow. What is the evidence in support of these statements on the one side and the other? On behalf of The Highlander, there is, in the first place, the protest of that vessel, in which it is stated that the anchor of The Gipse<sup>y</sup> King was hanging over her bow, and not on deck or catting, as is usual and customary. This statement is supported by the testimony of Gillies, the master, who swears, in his first affidavit, that the anchor was not properly catting, that one fluke was driven into The Highlander below the water mark; and that the damage was principally occasioned by the anchor of The Gipse<sup>y</sup> King hanging over the bow and into the water. He further states, in a second affidavit which he has made in conjunction with Browne, that the repairs were effected by inserting some African oak three feet below water mark. Without staying to notice the affidavits of [ \* 545 ] Roberts and of Butts, which do not \*materially affect the question in issue, I next come to the affidavit of Howard, the mate of The Highlander, whose statement, I must say, most fully supports the averment, as sworn to in the protest and in the

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affidavits of the master. He swears "that the anchor of The Gipse<sup>y</sup> King had penetrated the larboard bow of The Highlander, at least three feet below the water mark." And he further goes on to deny, not only that the anchor of The Gipse<sup>y</sup> King could have been properly catted, but that the accident could have happened by the rudder or keel of the Gipse<sup>y</sup> King catching the cable of The Highlander; averring, in conclusion, that The Gipse<sup>y</sup> King was steering towards The Highlander stem on, and that the collision was occasioned thereby. Now what, on the other side, is the evidence on behalf of The Gipse<sup>y</sup> King? The evidence consists, first, of the affidavit of Brunell, the mate, and two of the mariners on board The Gipse<sup>y</sup> King; and they swear to this effect:—"That the rudder or keel of The Gipse<sup>y</sup> King caught the cable of The Highlander, bringing the bowsprit of The Gipse<sup>y</sup> King in contact with The Highlander's fore-rigging, causing The Gipse<sup>y</sup> King's anchor to run into The Highlander's larboard bow, and the chain, whereby The Gipse<sup>y</sup> King's anchor hung, to give way." And they then proceed to swear:—"That the anchor of The Gipse<sup>y</sup> King was properly catted to the cathead, and hanging by a stationary chain stopper over the bow, near to but not under the water, in complete readiness to let go, on The Gipse<sup>y</sup> King's arrival at Bowling Bay." Next comes the affidavit of Graham, the pilot on board The Gulliver; and, after corroborating to the fullest extent the averment that the collision was occasioned by The Gipse<sup>y</sup> King's rudder catching the cable of The Highlander, he further swears:—"That it was [ \*546 ] absolutely necessary that the anchor of The Gipse<sup>y</sup> King should be properly catted, and placed in complete readiness to let go, on her arrival at Bowling Bay; that, from the manner in which the anchor of the schooner ran into the bow of The Highlander, he verily believes that the said anchor was at the time properly catted." The last affidavit to which I shall refer is the affidavit of Patteson, the foreman to the shipbuilders at Dunbarton; and he swears:—"That unless the anchor had been properly catted on board The Gipse<sup>y</sup> King, the anchor could not possibly have been in such a position as deponent found it, but must necessarily have struck The Highlander at least eight feet further down in her hull." And he concludes his affidavit by averring:—"That he and his men extricated the anchor from the bow of The Highlander, and that the said anchor had entered the ship's planks nearly level with the water."

Such being the material evidence upon the one side and the other, the question arises whether, upon this evidence, I can safely come to the conclusion that the anchor of The Gipse<sup>y</sup> King was not properly

catted. The Trinity Masters, it is to be observed, gave no opinion upon the point; to this extent, therefore, I conceive their authority supports me in negating the proposition, namely, that if they had been of opinion that the anchor was improperly catted, they would have noticed it in expressing their opinion.

I now proceed to consider the second point necessary to be established, in order to deliver The Gipsy King from her exemption from liability, namely, that assuming the anchor of that vessel to have been improperly catted, the collision in question was, [ \* 547 ] in \* the legal sense of the term, the immediate consequence thereof. This consideration may, I think, be shortly disposed of by the observation, " That it is perfectly clear, in the present instance, that the primary cause of the collision in question was, not the anchor of the Gipsy King, but the steering or towing of that vessel. This was the decided opinion of the Trinity Masters, and in that opinion I entirely concur. If this be so, I conceive that it is no part of my duty to examine how much of the damage might, by possibility, have been occasioned by the anchor subsequently running into The Highlander. Such an investigation would be to institute an examination into secondary and inferior causes, and would introduce a novel principle into proceedings of this kind, which I am not disposed to adopt.

I might here end my observations upon the case, but assuming, for a moment, that the mode of catting the anchor was the immediate cause of this collision, I will very shortly consider, in conclusion, how far the improper catting of the anchor was, under the circumstances of the case, to be attributed to the crew of 'The Gipsy King. Looking to the precedent of former cases decided in this court, it is, I apprehend, an established principle of law, that the mode, the time, and the place of bringing a vessel to an anchor, is within the peculiar province of the pilot who is in charge. This principle was distinctly laid down in the case of *The Agricola*,<sup>1</sup> and has been acted upon in subsequent cases which have come under my decision.<sup>2</sup> If the pilot, then, is to decide the mode of anchoring a vessel, it appears to me to follow, as a necessary consequence, that the pilot is respon- [ \* 548 ] sible to see that the anchor is in a proper \* situation to be dropped, when necessary. In the present case, this view of the pilot's duty is confirmed by the rules and regulations of the river in which this collision occurred, and in which he is licensed to act as a pilot. These rules especially enjoin what is to be done, as regards

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<sup>1</sup> [2 W. Rob. 10.]<sup>2</sup> [*The George*, 2 W. Rob. 386.]

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The Gipsy King. 2 W. Rob.

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the having the anchor in a proper position ready to be dropped; and such rules must be considered as peculiarly binding upon the pilot on board The Gipsy King, as being prescribed by the authority under which he was entitled to act.

Upon the whole view of the case, I am of opinion that the collision in this case was occasioned by the default of the pilot alone; that The Gipsy King was compelled to employ that pilot; and, consequently, that the owners are exempt from all responsibility for the damage. I give no costs on either side.

# APPENDIX.

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9 & 10 VICT. c. 99.

*An Act for consolidating and amending the Laws relating to Wreck and Salvage.*

August 28, 1846.

WHEREAS divers acts have been passed, through a long series of years, for preserving ships and goods stranded or cast on shore, as well as for preventing frauds and depredations on ship-owners and others, and for the adjustment of salvage: And whereas it is expedient to consolidate and amend the same: Be it therefore enacted by the queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That this act shall come into operation on the passing thereof, as to the appointment of the officers hereby authorized, and the posting of their names, and, as to the other parts thereof, on the first day of October, one thousand eight hundred and forty-six.

2. And be it enacted, That the several acts hereinafter mentioned and referred to shall be repealed; (that is to say,) an act passed in the twelfth year of the reign of her Majesty Queen Anne, intituled<sup>1</sup> "An Act for the preserving all such Ships and Goods thereof which shall happen to be forced on shore or stranded upon the Coasts of this Kingdom, or any other of her Majesty's Dominions;" and also an act passed in the fourth year of the reign of his Majesty King George the First, intituled<sup>2</sup> "An Act for enforcing and making perpetual an Act of the Twelfth Year of her late Majesty, intituled 'An Act for the preserving all such Ships and Goods thereof which shall happen to be forced on shore or stranded upon the Coasts of this Kingdom, or any other of her Majesty's Dominions;' and for inflicting the Punishment of Death on such as shall wilfully burn or destroy Ships;" and also an act passed in the twenty-sixth year of the reign of his Majesty King George the

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<sup>1</sup> 12 Anne, st. 2, c. 18.

<sup>2</sup> 4 G. I. c. 12.

Second, intituled <sup>1</sup> “ An Act for enforcing the Laws against Persons who shall steal or detain shipwrecked Goods, and for the Relief of Persons suffering Losses thereby ; ” and also an act passed in the forty-ninth year of the reign of his Majesty King George the Third, intituled <sup>2</sup> “ An Act for preventing Frauds and Depredations committed on Merchants, Ship-Owners, and Underwriters, by Boatmen and others ; and also for \*remedying [ \* 2 ] certain Defects relative to the adjustment of Salvage in England, under an Act made in the Twelfth Year of Queen Anne ; ” and also an act passed in the fifty-third year of the reign of his Majesty King George the Third, intituled <sup>3</sup> “ An Act to continue for Seven Years Two Acts, passed in the Forty-eighth and Forty-ninth Years of His present Majesty, for preventing Frauds by Boatmen and others, and adjusting Salvage, and for extending and amending the Laws relating to Wreck and Salvage ; ” and also an act passed in the fifty-third year of the reign of his Majesty King George the Third, intituled <sup>4</sup> “ An Act to amend an Act made in the last session of parliament, intituled ‘ An Act for the more effectual Regulation of Pilots and of the Pilotage of Ships and Vessels on the Coast of England,’ and for the Regulation of Boatmen employed in supplying vessels with Pilots licensed under the said Act, so far as relates to the Coast of Kent within the limits of the Cinque Ports ; ” and also an act passed in the session of parliament holden in the first and second years of the reign of his Majesty King George the Fourth, intituled <sup>5</sup> “ An Act to continue and amend certain Acts for preventing Frauds and Depredations committed on Merchants, Ship-Owners, and Underwriters, by Boatmen and others ; and also for remedying certain Defects relative to the Adjustment of Salvage in England, under an Act made in the Twelfth Year of Queen Anne ; ” and also so much of an act passed in the session of parliament holden in the third and fourth years of the reign of her present Majesty Queen Victoria, intituled <sup>6</sup> “ An Act to improve the Practice and extend the Jurisdiction of the High Court of Admiralty of England,” as relates to awards made by justices and others in salvage cases, and appeals therefrom ; and also so much of an act passed in the session of parliament holden in the eighth and ninth years of her present Majesty Queen Victoria, intituled <sup>7</sup> “ An Act for the general Regulation of the Customs,” as relates to persons being in possession of goods derelict, jetsom, flotsam, or wreck, and to the disposal of such goods ; and also an act passed in the parliament of Ireland, in the fourth year of the reign of his Majesty King George the First, intituled <sup>8</sup> “ An Act for the preserving all such Ships and Goods thereof which shall happen to be forced on shore or stranded upon the Coasts of this Kingdom ; ” and also so much of an act passed in the parliament of Ireland, in the eleventh year of the reign of his Majesty King George the Second, intituled <sup>9</sup> “ An Act for enforcing and making perpetual an Act, intituled ‘ An Act for the preserving of all such Ships and Goods thereof which shall happen to be forced on shore or stranded upon the Coasts of this Kingdom ; ’ and also for

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<sup>1</sup> 26 G. II. c. 19.

<sup>4</sup> 53 G. III. c. 140.

<sup>7</sup> 8 & 9 Vict. c. 86.

<sup>2</sup> 49 G. III. c. 122.

<sup>5</sup> 1 & 2 G. IV. c. 75.

<sup>8</sup> 4 G. I. c. 4.

<sup>3</sup> 53 G. III. c. 87.

<sup>6</sup> 3 & 4 Vict. c. 65, s. 5.

<sup>9</sup> 11 Geo. II. c. 9.



inflicting the Punishment of Death on all such as shall wilfully burn, sink, or destroy ships," as makes the said last-mentioned act of the fourth year of the reign of his Majesty King George the First perpetual ; and also so much of an act passed in the parliament of Ireland in the seventeenth year of the reign of his Majesty King George the Second, intituled <sup>1</sup> " An Act for the [ \* 3 ] Amendment of the Law in relation to Forgery, \* and the Salvage of Ships and Goods stranded," as relates to salvage and proceedings relating thereto ; and also an act passed in the session of the parliament of Ireland, holden in the twenty-third and twenty-fourth years of the reign of his Majesty King George the Third, intituled <sup>2</sup> " An Act for the Amendment of the Law in relation to the Salvage of Ships and Goods stranded, or in danger of perishing at Sea ; " and the said several acts and parts of acts hereinbefore mentioned and set forth are hereby accordingly repealed, except so far as the said acts, or any of them, or any thing therein contained, repeal any former act or acts, or any parts thereof ; and all and every which said act or acts, or the parts thereof so repealed, shall remain and continue repealed to all intents and purposes whatsoever : Provided always, that all offences which shall have been committed, and all penalties and forfeitures which shall have been incurred, previously to the first day of October, one thousand eight hundred and forty-six, shall and may be punishable and recoverable respectively under the above-mentioned acts or any of them, as if the same had not been repealed.

3. And be it enacted, That, for the purpose of carrying the provisions of this act into effect, the receiver-general of droits of admiralty may from time to time appoint persons to act under him, to be styled " receivers of droits of admiralty ; " and, in the construction of this act, the word " receivers " shall mean receivers of droits of admiralty ; and such receivers shall hold their offices during the pleasure of the receiver-general and the pleasure of the commissioners of admiralty ; and the said receivers shall be entitled to the fees hereinafter mentioned, together with a further remuneration, to be defrayed out of the proceeds of sales of droits made by them, at the rate of five pounds for every hundred pounds, after abating the charges and expenses incurred by them ; and the said receiver-general shall send a list containing the names of such receivers, with their respective addresses, to the collectors of her Majesty's customs at the different ports of England and Wales and Ireland, and also to the secretary of the committee for managing the affairs of Lloyd's, in the city of London ; and the said collectors and secretary respectively shall cause the said list to be affixed in a conspicuous place, in the custom-houses in the said ports and at Lloyd's aforesaid respectively : Provided always, that all the provisions contained in this act having reference to the said receivers, whether as to their style, office, powers, duties, remuneration, or otherwise, or as to the posting of their names, shall in all respects be applicable to those persons who shall, at the time of the passing of this act, have been appointed agents to the said receiver-general of droits of admiralty in as full and ample a manner as if the said agents had been appointed receivers

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<sup>1</sup> 17 G. II. c. 11.

<sup>2</sup> 23 & 24 G. III. c. 48.

under this act ; and all appointments in writing, of agents or receivers, by the receiver general of droits of admiralty, heretofore, or which may be hereafter made, are hereby declared to be exempt from stamp duty.

\* 4. And be it enacted, That every lord or lady of any manor, or [ \* 4 ] patentee or grantee of the crown, or other person or body corporate who may be entitled to or claim to be entitled to wreck of the sea, or to any goods found jetsam, flotsam, lagan, or derelict, shall deliver, or send by the general post or otherwise, a notice in writing, setting forth such claim, to such one of the receivers respectively whose residence shall be within or nearest to the said manor, or other district in which such claim is made ; and that no such lord or lady of any manor aforesaid, patentee or grantee of the crown, nor any other person or body corporate, shall be considered as possessing such title, or be able to enforce the same at law or in equity, until such notice shall have been so given as aforesaid : Provided always, that where two or more notices shall be given claiming the same rights, the party who shall adduce to the receiver evidence of his having enjoyed such rights, or, if both parties shall adduce evidence thereof, then the party who shall appear to the receiver to have been last in the enjoyment of such rights, shall be considered as the party entitled, until such conflicting claims shall have been finally determined at law or in equity ; and unless such evidence shall be adduced by one of the said parties, such receivers, being in possession of such wreck of the sea, or goods jetsam, flotsam, lagan, or derelict, shall not deliver the same, except to the original owner thereof, until such conflicting claims shall have been determined as aforesaid.

5. And be it enacted, That all persons whomsoever who shall find, take up, or be in possession of any wreck of the sea, or any goods jetsam, flotsam, lagan, or derelict, or any boat, vessel, apparel, anchor, cable, tackle, stores, or materials, or any goods, merchandise, or other article whatsoever, which shall have been found floating or sunk at sea, or elsewhere in any tidal water, or cast, thrown, or stranded upon the shore, and whether the same be found above or below high-water mark, and whether wholly on land or wholly in the water, or partly on land and partly in the water, or shall find or take possession of any droit of admiralty of any description, whether such person shall claim to be entitled to such article or droit or not, shall forthwith send to the receiver, or to the collector or comptroller of customs, at the port or place nearest to which such articles or droits have been found, a report in writing of all such articles or droits so found, containing an accurate and particular description of the marks (if any) thereon, and of the time and situation when and where the same were found, and shall also forthwith place such articles or droits at the disposal of the said receiver or officer of the customs ; and every officer of the customs receiving such report shall forthwith transmit the same to the nearest receiver ; and every person who shall keep possession of or retain, or conceal or secrete, any such wreck of the sea, jetsam, flotsam, lagan, derelict, boat, vessel, apparel, anchor, cable, tackle, stores, materials, goods, merchandise, or other article as aforesaid, or shall deface, take out, or obliterate any name, mark, or number \* thereon, or [ \* 5 ] alter the same in any manner, or shall keep possession of or retain,

or conceal or dispose of any droit of admiralty, or shall not forthwith report and place at the disposal of such receiver or officer of the customs any such article or droit in the manner aforesaid, shall forfeit all claim to salvage, and shall, on conviction, forfeit any sum not exceeding one hundred pounds, and also forfeit and pay double the value of the articles to the owner thereof, if claimed, or to her Majesty, if the same become or be a droit of admiralty ; which double value may be recovered in the same manner as a penalty under this act.

6. And be it enacted, That it shall be lawful for any receiver or officer of the customs upon warrant obtained by application to any magistrate or justice of the peace, who is hereby empowered to grant the same, to search for, seize, and detain any such article or droit as shall not have been reported or dealt with in the manner hereinbefore directed, either on shore, stranded, or afloat, and for that purpose to enter any house, store, or building, or any ship, vessel, or boat ; and every officer of the customs so seizing as aforesaid shall forthwith send to the nearest receiver a report in writing of the articles or droits so seized, and describing the marks (if any) thereon ; and every receiver or officer of the customs so seizing as aforesaid shall be entitled to salvage for the said articles or droits ; and if any such seizure shall have been made in consequence of any information given to any such receiver or officer of the customs, the person who shall give such information shall be entitled to receive such reward out of the salvage as the receiver general of droits of admiralty shall think fit to allow ; Provided always, that it shall be lawful for any receiver, as often as the case may arise when articles or droits of admiralty found within the jurisdiction of the High Court of Admiralty shall be carried away out of such jurisdiction, either within the limits of the Cinque Ports or elsewhere, to seize and carry away the same, and place them in some warehouse or other place of security, to be dealt with in the same manner as is hereby directed and provided in the case of articles which shall have been so reported as aforesaid.

7. And be it enacted, That every receiver to whom any such report shall be sent, or by whom any such seizure shall be made as aforesaid, shall within forty-eight hours send to the principal officer of the customs, at the nearest port, a report in writing containing an accurate description of the articles so reported or seized, and the said receiver shall also forward a report of the articles so reported to or seized by him to the secretary of the committee of Lloyd's aforesaid, and the same shall be placed by the said secretary in some conspicuous situation for the inspection of all persons choosing to inspect and examine the same ; and if the said secretary shall neglect or refuse so to place such report or copy, or any other report or copy by this act so directed to be placed, he shall for every such neglect or refusal forfeit and pay the sum of five pounds ; and

the receiver shall for every such report so forwarded to the said secretary be entitled to receive of and from the owner \* of the articles in respect of which such report shall have been made, if the same be claimed, or out of the produce of the sale thereof, if the same be not claimed, the sum of ten shillings : Provided always, that no report shall be forwarded by a receiver to the said secretary until the articles for and in respect of which

a report is required shall amount in value to the sum of twenty pounds at the least.

8. And be it enacted, That as often as it shall happen that any lord or lady of any manor, or patentee or grantee of the crown, or other person or body corporate entitled to or claiming to be entitled to wreck of the sea, or to any goods found jetsam, flotsam, or lagan, shall have given notice to a receiver of such claim as hereinbefore directed, and that subsequently to such notice being given any articles shall be reported to or seized by the same or any other receiver which may appear to such receiver to have been found within the limits of the manor or district in respect of which such notice of claim shall have been given, it shall be lawful for such receiver and he is hereby directed and required, within twenty-four hours after receiving such report or making such seizure, to send by the general post or otherwise to the said lord or lady of a manor, or patentee or grantee of the crown, or other person or body corporate having made such claim as aforesaid, or to his, her, or their bailiff, reeve, or other officer, a notice in writting setting forth an account and description of the article so reported or seized, and of the place and time when and where the same was found.

9. And be it enacted, That if the rightful owner of any article which has been so reported to or seized by any receiver as hereinbefore directed shall make out his claim to the said article, to the satisfaction of the said receiver, within the period of twelve calendar months from the day on which such article shall have been so reported to or seized by the said receiver, such article shall be restored to the said owner, on payment of the duties and necessary charges attending the care or removal of the same, and a reasonable compensation for salvage thereof, and also on payment to the said receiver of a sum after the rate of five per centum on the value of the article, but in no case, whatever may be the value of the articles, shall such percentage exceed fifty pounds.

10. And be it enacted, That when any such article as aforesaid shall have been in the custody of any receiver in manner aforesaid, and shall not be legally claimed by the owner thereof within the aforesaid space of twelve calendar months, and any lord or lady of a manor, or patentee or grantee of the crown, or other person or body corporate, having given due notice of his or her claim as hereinbefore required, or his, her, or their bailiff, reeve, or other officer, shall within the space of thirty days after the expiration of the said term of twelve calendar months make it appear to the said receiver, by the production of satisfactory evidence, that such article was found within the manor or district in respect of which such claim is made, it shall be lawful for the receiver and he is \* hereby required and enjoined to [ \* 7 ] deliver up such article to the said lord or lady of a manor, or patentee or grantee of the crown, or other person or body corporate, or his, her, or their bailiff, reeve, or other officer, on payment of the duties, and all charges and expenses attending the care or removal of the said article, together with a reasonable compensation for salvage, and also on payment to the said receiver of a sum after the rate of five per centum on the value of the article, but in no case, whatever may be the value of the articles, shall such percentage exceed the sum of fifty pounds : Provided always, that if the receiver shall determine

against the right of any person claiming to be the owner of any such article as aforesaid, or against the evidence produced by any lord or lady of a manor, or patentee or grantee of the crown, or other person or body corporate, as to the finding of any such article as aforesaid, he shall be bound, at the request of the party against whom he shall have determined respectively, to signify such determination in writing, with the date thereof and the reasons for the same.

11. And be it enacted, That when no claim to any article in the custody of any receiver or officer of customs as aforesaid shall be established, either by the owner thereof, or by any lord or lady of a manor, or patentee or grantee of the crown, or other such person or body corporate as aforesaid, within the said respective periods as aforesaid, then the said article shall be deemed and taken to be droits of admiralty, and shall be sold by the said receiver, without any legal process whatsoever, and the net proceeds thereof, after the payment of salvage, when the same shall be payable, and of the other charges, shall be forthwith transmitted by him to the said receiver general: Provided always, that when any article in the custody of any receiver or officer of customs as aforesaid shall be of so perishable a nature, or so much injured or damaged, that the same cannot, in his opinion, be kept, or if the value thereof shall not be sufficient to defray the charge of warehousing, then and in every such case it shall be lawful for the said receiver to sell the same before the expiration of the periods hereinbefore mentioned, and the money raised by such sale, after defraying the salvage and other expenses thereof, shall be transmitted by him to the said receiver general, and remain in the hands of said receiver general, to abide and be subject and liable to the claims of all persons, in like manner as the article itself would remain and be subject and liable to if remaining unsold: Provided also, that it shall be lawful for any receiver, and he is hereby authorized, if he in his discretion think fit, when he shall have in his custody any article which shall not appear to him to be of greater value than five pounds, to sell the same before the expiration of the said periods, and forthwith pay salvage to the party claiming the same, and to transmit the remainder of the proceeds of such sale in the manner hereinbefore provided; but in every such last-mentioned case the salvor shall not be entitled to more than one third of the net produce of such sale.

[ \* 8 ] 12. And be it enacted, That no vice-admiral or deputy \* vice-admiral of any county, or any agent of the same, shall as such henceforth receive, take, seize, or in any manner interfere with any wreck of the sea, or any other of the goods or articles hereinbefore mentioned.

13. And be it enacted, That as often as it shall happen, upon the sale of articles as hereinbefore directed, that after the payment of duties and other necessary expenses there shall not be left a sum sufficient to defray the salvage, it shall be lawful for the receiver, or, if the same shall happen within the jurisdiction of the lord warden of the Cinque Ports, the deputy serjeant or other officer of the said lord warden in whose respective custody the articles shall have been, to send a report, stating the circumstances, the said receiver to the said receiver general, and the said deputy serjeant or other officer to the said lord warden, as the case may be; and the commissioners of her Majesty's treasury, on receiving an application thereupon from the said receiver general or from the said lord warden, as the case may be, may and they are hereby



authorized to allow such sum to be paid out of her Majesty's exchequer by way of salvage as they shall deem sufficient.

14. And be it enacted, That when any ship or vessel whatsoever shall be in distress, or in danger of being stranded or run on shore, or shall be stranded or run on shore, every receiver, as well as all justices of the peace, and also all mayors, bailiffs, and other officers of corporations and port towns, and all constables, headboroughs, tythingmen, and officers of the customs and excise, shall summon and call together as many men as shall be thought necessary to the assistance and preservation of such ship or vessel and its cargo, or for the saving human life, and if there shall be any ship or vessel belonging to any of her Majesty's subjects, or any waggons, carts, and horses, near the place where such ship or vessel is in distress or danger as aforesaid, the said receiver and other officers hereinbefore mentioned, or any of them, are hereby required and empowered to demand of the superior officer of such ship or vessel assistance by boats, or such hands as can be conveniently spared, and to demand the use of any waggons, carts, and horses of the owner or person having the charge thereof, for the service and preservation of the said ship or vessel in distress as aforesaid, and her cargo, or for the saving human life; and every such superior officer, owner, or person refusing or neglecting to comply immediately with such demand shall for every such refusal or neglect forfeit and pay any sum not exceeding one hundred pounds.

15. And be it enacted, That for the prevention of confusion among persons assembled to save any ship or vessel in distress as aforesaid, or any of the goods or effects belonging thereto, all persons so assembled shall conform, in the first place, to the orders of the master or owner or officer in charge of the said ship or vessel in distress, and in the next place to those of the receiver, and for want of their presence to those of the officers hereinafter mentioned, in the following subordination, as any of such \* officers [ \* 9 ] shall be present; (that is to say,) first the officers of customs or coast guard, then those of the excise, then of the sheriff or his deputy, then any justice of the peace, then any mayor or chief magistrate of any corporation, then any coroner, then any chief constable, then any petty constable or peace officer; and any person whomsoever acting knowingly or wilfully contrary to such orders shall, on conviction before one justice of the peace, forfeit and pay any sum not exceeding fifty pounds.

16. And be it enacted, That any receiver, or in his absence any justice of the peace, shall, as soon as conveniently may be, examine upon oath (which oath they are hereby respectively empowered to administer) any person belonging to any ship or vessel which may be or may have been in distress, or others who may be able to give any account thereof, or of the cargo or stores thereof, as to the name or description of the said ship or vessel, and the names of the master, commander, or chief officer and owners thereof, and of the owner of the said cargo, and of the ports or places from or to which the said ship or vessel was bound, and the occasion of the said ship's distress, and of the services rendered, and as to any other matter or circumstance relating to the said ship or cargo, or any of the stores thereof, as the said receiver or justice may think fit and necessary; and the said receiver or justice shall take



the said examination down in writing, and shall make two copies of the same, the one of which he shall send to the said receiver general, and the other to the secretary of the committee of Lloyd's aforesaid, and the said copy shall be placed by the said secretary in some conspicuous situation, in like manner as hereinbefore directed with respect to other reports so to be made to the said secretary as aforesaid ; and for every such examination by a receiver he shall be entitled to receive from the owner of the said vessel or cargo, or out of the produce of the sale thereof, the sum of one pound ; and it shall be lawful for the said receiver or for any officer of the customs, at the request in writing of the said receiver, to detain such vessel or cargo until the said sum be paid. Provided always, that if any person belonging to the said ship or vessel, or otherwise, shall refuse to be so examined by the said receiver or justice as aforesaid, he shall for every such refusal forfeit and pay any sum not exceeding fifty pounds.

17. And be it enacted, That it shall be lawful for the receiver at that part of the coast where any ship or vessel shall be stranded or wrecked, or where any wreck of the sea or goods shall be cast on shore, and also for the owner or master of any such ship or vessel, and for the owners of any such goods or of any part thereof, and for any officer of the customs, coast guard, or excise and other officer, and for all persons whomsoever, employed or acting in aid of or in the assisting of any such receiver, officer, master or owner as aforesaid, in the saving or recovering any such ship or vessel, or the cargo, stores, tackle, or other article belonging to the same, or the preserving the lives of the crew or persons belonging thereto, or of any wreck as aforesaid, to pass [ \* 10 ] and repass \* with their horses, carts, carriages, or servants, doing as little damage as possible, over any lands, pier, jetty, wharf or landing place near to the part of the sea coast where such vessel shall be so wrecked or stranded, or on which such wreck shall be cast, without interruption or obstruction by the owner or occupier thereof, for the purpose of saving, recovering and preserving any such ship or vessel, or goods or stores, or any boat, cables, timbers, spars, masts, cordage, or other tackle or article belonging to any ship or vessel, or for saving or otherwise assisting in preserving the lives of any persons, or for the taking possession of any wreck or goods or other article cast on shore, or found on shore, or found near thereto, provided there shall be no road by which the parties may pass and repass with as much convenience and expedition as over such lands, pier, jetty, wharf or landing place, and also to place any planks, timber, or any part of the wreck, or any goods or stores or other article removed or saved from any such ship or vessel, or any other wreck or goods or other article as aforesaid, upon any such land, pier, jetty, wharf or landing place, for a reasonable time, until they can be removed to some warehouse or safe place of deposit, doing as little damage as possible, and making compensation to the occupier of such land, pier, jetty, wharf or landing place for any damage done by all or any the means aforesaid, which compensation shall be a charge upon the wreck, goods, or other article in respect whereof the damage may be done, in like manner as salvage ; and in case the parties cannot agree as to the amount thereof, then the same shall be ascertained and settled in any of the manners and within such times as the amount of salvage is herein directed to be ascertained and settled.

18. And be it enacted, That if any owner or occupier of any land or premises over which any person is authorized by this act to pass and repass for any of the purposes hereinbefore mentioned shall interrupt, impede, or hinder any such person from passing over his land or premises, with or without horses, carts, carriages or servants, for the purposes hereinbefore mentioned or any of them, by locking his gates, or refusing upon request to open the same, or otherwise, or shall obstruct or hinder the placing any such plank, timber, part of a wreck, goods, stores, or other article upon his land, pier, jetty, wharf or landing place, or shall prevent their remaining there for a reasonable time, until the same can be removed to some warehouse or safe place of public deposit, such owner or occupier shall for every such offence forfeit and pay any sum not exceeding one hundred pounds.

19. And be it enacted, That every person (except receivers under this act) who shall act or be employed in any way whatsoever in the saving or preserving of any ship or vessel in distress, or of any part of the cargo thereof, or of the life of any person on board the same, or of any wreck of the sea, or of any goods jetsam, flotsam, lagan or derelict, or of any anchors, cables, tackle, stores or materials which may have belonged to any ship \* or [ \* 11 ] vessel, whether the said ship or vessel shall have been in distress or otherwise, and whether such person shall have so acted at the request of or on application by any person in authority, or by the master or owner of any ship or vessel, or otherwise, shall within fourteen days after the service so performed, or within fourteen days after the owner or any other person shall have established his claim to any such article as aforesaid, be paid a reasonable reward or compensation by way of salvage for such service, by the commander, master, or other superior officer, mariners, or owner of the said ship or vessel, or their agent, or by the merchant whose ship, vessel or cargo shall be so saved as aforesaid, or by the owner of the other articles hereinbefore mentioned, or other person claiming the same ; and in default thereof the said ship or vessel, or any part of the cargo remaining on board thereof, so saved as aforesaid, shall remain in the custody of the High Court of Admiralty, and the said goods or other article, (and also, until warrant issued from the High Court of Admiralty, the said ship, vessel or cargo,) shall remain in the custody of the receiver, or officer of the customs, until the person so acting or employed in the preservation of such ship or vessel, goods or other article as aforesaid, shall have been reasonably compensated for his said assistance and trouble, or reasonable security given for that purpose to the satisfaction of the said receiver, or officer of the customs, or High Court of Admiralty : Provided always, that every receiver who shall act or be employed in the saving or preserving of any ship or vessel in distress, which shall not become a droit of admiralty, shall be entitled to receive from the owner thereof the sum of two pounds for the first day, and the further sum of one pound for every subsequent day on which he shall be employed in the said service, if the said ship or vessel, together with the cargo thereof, shall be of or above the value of six hundred pounds, and the said receiver shall be entitled to a moiety of such respective sums if the said ship and cargo shall be under the value of six hundred pounds ; and the said ship or vessel shall be so detained as aforesaid until such sums shall have been paid to the said receiver.

20. And be it enacted, That it shall be lawful for the said receiver general to make rules, and vary and alter the same, from time to time, as he may think proper, for regulating the rate of salvage to be paid by the receivers when any ship, vessel, boat, apparel, anchor, cable, tackle, stores, materials, goods, merchandise or other article whatsoever shall not be proved to belong to any owner or other person, and shall be sold as droits of admiralty in manner hereinbefore directed.

21. And be it enacted, That if any person shall have rendered any service (except ordinary pilotage) in the saving or preserving of any ship or vessel in distress, or of the cargo thereof, or of the life of any person on board the same, or of any wreck of the sea, goods or other article hereinbefore mentioned, which shall not become droits of admiralty, and the said person, and [ \* 12 ] the master or owner of such ship or vessel, or his agent, or the \* owner of such article, or his agent, cannot agree upon the amount of salvage or compensation to be paid in respect of such service, then such person shall deliver to such master, owner or agent a statement in writing, without prejudice to either party, of the amount of salvage or compensation claimed for such services, and (unless such salvage shall have been already paid by any receiver under the powers hereinbefore contained, or the claim thereto shall exceed the sum of two hundred pounds) the matter or difference may be determined by any two justices of the peace residing at or near to the place where such service has been rendered, within forty-eight hours after such difference shall be referred to them for their determination thereof, and if they cannot agree respecting the same, then it shall be lawful for them to nominate any third person conversant in maritime affairs, at their option, who shall ascertain the amount of salvage to be paid within forty-eight hours after he shall be so nominated as aforesaid; and the said justices and such third person so nominated as aforesaid shall have full power and authority, whenever they see occasion, to examine the parties or their witnesses upon oath, which oath they or any one of them are and is hereby authorized to administer; and it shall be lawful for the person so to be nominated by the said justices, who shall decide on the amount of salvage to be paid as aforesaid, to demand and receive of and from the owner of the ship or vessel aforesaid, or of the articles so saved as aforesaid, or of the salvors or their respective agents, a sum of money not exceeding two pounds two shillings; and such owner, or his agent, or such salvors, at the discretion of the said justices or person appointed by them as aforesaid, are hereby required to pay the same to the person so nominated as aforesaid immediately after he shall have made his award or decision, and such sum of two pounds two shillings, and such amount of salvage, may be recovered as any penalty imposed by this act: Provided always, that when the salvage claim shall exceed the sum of two hundred pounds, then and in every such case the said matter or difference shall, in the event of no such agreement being made as aforesaid, either by reference to arbitration or otherwise, be determined exclusively by the High Court of Admiralty.

22. And be it enacted, That it shall be lawful\* for the commissioners of admiralty to nominate and appoint, in such ports or towns and for such districts as in their discretion they may think fit, three or more proper persons for each port, town or district respectively, to be called commissioners of salvage,

who, or any three or more of them, shall have power to adjust and determine any difference respecting salvage, in the same manner and in such cases as the justices hereinbefore in that respect mentioned, and also to nominate and appoint a proper person to act as secretary or registrar to the said commissioners, and which secretary or registrar shall enter in a book kept for that purpose all the proceedings of such commissioners, and also a copy of the awards which they shall have from time to time made ; and \* the [ \* 13 ] said commissioners of salvage, or any three or more of them, shall have the power of examining on oath, and all other the same power and authorities as are hereinbefore given to the said justices, and to the person to be by them nominated as aforesaid ; and such commissioners of salvage, or any three or more of them, who shall decide in any such case as aforesaid, and their secretary or registrar, may and they are hereby authorized to demand of and from the owner of any ship or vessel or of any article against whom any person may make any claim or demand for service rendered on preserving the same, and such owner or salvors is and are hereby required to pay such fee or reward for deciding on every such claim as shall be regulated and appointed in that behalf by the commissioners of the treasury ; and the said commissioners of salvage, or any three or more of them, shall have the power to commit for contempt.

23. And be it enacted, That in case any person so claiming to be entitled to salvage or compensation for services rendered as aforesaid, or the person against whom such claim is made, or his agent, shall be dissatisfied with such award and decision of the said justices or person so to be nominated by them as aforesaid, or of the said commissioners of salvage, it shall be lawful for either of them respectively, within ten days after such award shall have been made, but not afterwards, to notify to such justices, or to the said commissioners of salvage, as the case may be, his desire of obtaining the judgment of the High Court of Admiralty respecting the said salvage or compensation, and thereupon such person shall forthwith proceed by taking out a monition within thirty days from the date of such award ; but in such case the receiver or officer of the customs in whose custody such ship, vessel, goods, or other article in respect of which such claim of salvage has been made shall have been detained as aforesaid is hereby required and empowered to release such ship or vessel, and to deliver to the owner or proprietor, or his agent, such goods or other article, upon the said owner or proprietor or his agent giving good and sufficient bail in double the amount of the sum awarded for salvage or compensation, or if no sum shall have been so awarded, then to such amount as the said receiver shall deem sufficient, and which bail the said receiver is hereby authorized to take and certify according to the form contained in the schedule (A) hereunto annexed, and transmit the same without delay to the said receiver general, together with a true certificate in writing of the gross value of the article respecting which salvage shall be claimed, and also a copy of such proceedings and award, on unstamped paper, certified under the hand of the said receiver taking such bail as aforesaid, and the same shall be admitted by the said Court of Admiralty as evidence in the cause ; and the said receiver shall for every such certificate be entitled to receive from the owner of such ship or

vessel, goods or other article, or his agents, or from the proceeds of the sale thereof, the sum of one pound one shilling.

24. Provided always, and it is hereby enacted, That after any such award has been made, either by the said justices or person nominated by them, or by the said commissioners of salvage as aforesaid, and the owner of [ \* 14 ] \* such ship or vessel, goods or other article, in respect of which such award of salvage is made, or his agent, shall refuse or neglect either to pay the same, or to give notice of such appeal, or to take out such monition as aforesaid, it shall be lawful for the receiver, at or nearest to the place where such award has been made, and he is hereby required, within twenty days after the making of the said award, and on production of the same, to sell the property contained in such ship or vessel, or the said goods or other articles, as the case may be, or such and so many of the same as in his opinion will be sufficient to defray the salvage, and the costs and charges relating thereto, paying the surplus, if any, to the owner or owners thereof: provided also, that in all cases which shall be decided by any justices of the peace, or their nominee, or by the said commissioners of salvage, the High Court of Admiralty shall only have jurisdiction as a court of appeal, in accordance with the provisions of this act, or for the purpose of enforcing payment of the sum awarded.

25. And be it enacted, That whenever any sum to be paid for any such services as aforesaid, either voluntarily or in consequence of any agreement, or of any arbitration, or of any award made by any such justices or by the said commissioners of salvage as aforesaid, or, within the jurisdiction of the Cinque Ports, by any commissioners, shall be distributable between two or more persons, such sum shall be paid to such person as shall be appointed by the justices or commissioners in and by their award, or by the arbitrator making any award, or under any agreement which may have been made, or in default of any such appointment, then to the master or owner of the boat, ship, or vessel having rendered the services, or his agent, or to some person nominated in writing by or on behalf of the majority of the persons among whom such sum is distributable; and every person to whom any such sum shall be paid shall, within three days after the same shall have been paid, or as soon after as may be, proceed to make allotment thereof among the several persons interested in the distribution thereof, and to give notice, in the form contained in the schedule (B.) to this act annexed, to each person, of the whole sum so paid, and of the share thereof allotted to him; and within thirty days after the sum shall have been so paid, or within twenty-eight days after such notice shall have been given, and not afterwards, it shall be lawful for any person, claiming a share of the said sum, who shall think himself aggrieved, either by no allotment having been made, or by no notice thereof having been given to him within ten days after the sum shall have been so paid, or by the insufficiency of the share allotted to him, or otherwise, to apply, if the share so allotted, or if no share shall be so allotted, then if the share claimed by him shall be under twenty pounds, to the justices or commissioners who may have determined such salvage case, or within whose jurisdiction such salvage case may have occurred, who shall have full power to adjudge the due distribution of the sum so paid as



aforesaid, and the shares of the different parties entitled thereto, which shares may then be recovered from the person to whom such sum shall have \* been so paid, in like manner as is hereby provided for the [ \* 15 ] recovery of any penalty under this act; and if the share which shall be so allotted, or, if no share has been allotted, which shall be so claimed by the person so thinking himself aggrieved as aforesaid, shall amount to twenty pounds, then it shall be lawful for such person, within the said term of thirty days, or the said term of twenty-eight days (but not afterwards), to apply to the judge of the High Court of Admiralty, or his surrogate, for a monition against the person to whom the said sum has been so paid as aforesaid, to bring the said sum, or any part thereof, which shall appear not to have been duly distributed, into the registry of the said court, and appear, and abide the judgment of the said court concerning the distribution thereof; and the judge of the said court, or his surrogate, shall, on due cause shown, issue such monition, and the said court shall have jurisdiction to enforce the same, and to adjudge the due distribution of such sum accordingly; and in the case of an award the person by whom such award shall have been made shall, upon monition, send in without delay to the said court a copy of the proceedings before him, and of the award, on unstamped paper, witnessed under his hand, and the same shall be admitted by the court as evidence in the cause; and the amount so awarded, or such part as shall appear not to have been duly distributed, shall be paid to the parties suing out such monition, or distributed according to the judgment of the said court.

26. And be it enacted, That whenever it shall appear that any sum which has been awarded or voluntarily agreed to be paid for salvage services shall have been duly paid by the master or owner of any ship, vessel, or goods to which such service shall have been so rendered, or his agent, to the appointee of the justices or commissioners or of the arbitrator making any award, or under any agreement, or in default of such appointment to the master or owner of the boat, ship, or vessel having rendered such services, or to the person nominated as aforesaid, as the case may be, then and in every such case any person, claiming any share in such sum, who may think himself aggrieved by the insufficiency of the share allotted to him, or otherwise shall be precluded from enforcing such claim against the ship, vessel, or goods to which services shall have been rendered, or the owner thereof: Provided always, that any party who shall claim to be entitled to any sum which shall remain undistributed in the hands of any person to whom the same may have been paid may, within twelve months after such payment, have the same remedies for the recovery of such sum from the person to whom the same shall have been paid as are hereinbefore provided respecting the recovery of shares in any sum paid for salvage services after adjudication of the distribution thereof.

27. And be it enacted, That when any sum shall be paid for any such salvage as aforesaid, either voluntarily or in consequence of any award having been made in manner aforesaid, or security given for the payment thereof, and it shall appear that any ship or vessel, goods or other article, in respect of the saving of which \* such sum shall have been so paid or [ \* 16 ] such security given, shall be detained in the custody of any officer of



customs or of the High Court of Admiralty (as the case may be) as aforesaid, it shall not be lawful for the said officer or the said court to permit such ship or vessel to depart, or to give up such goods or other article, until the production of a writing signed by the persons to whom such salvage shall be payable, or some or one of them, which shall contain a description of such ship or vessel, or goods or other article, together with an account of the sums that have been so paid, or of the security given for the same; and the said officer or the court (as the case may be) shall send a copy of such writing to the nearest receiver, who shall transmit the same, or a copy thereof, to the said receiver general.

28. And be it enacted, That if any person shall wilfully cut away, cast adrift, remove, alter, deface, sink or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink or destroy, or in any other way injure or conceal any boat, buoy, buoy-rope or mark, such person so offending shall, on being convicted of any such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or imprisoned for any number of years not exceeding three, with or without hard labor, at the discretion of the court in which such conviction shall have taken place.

29. And be it enacted, That if any person shall knowingly or wilfully, and with intent to defraud the true owner thereof, or any person interested therein, purchase or receive any boat, anchor, cable, goods or merchandise which may have been taken up, weighed, swept for, or taken possession of, if the provisions hereinbefore contained with regard to such articles shall not have been previously complied with, such person shall, on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to be stolen, and shall be punished accordingly.

30. And be it enacted, That in case the master, mate, crew, or passenger of any ship or vessel shall find or take in tow or on board of such ship or vessel, any vessel, boat, anchor, cable or any goods, merchandise, or other article, or shall receive any vessel, boat, anchor, cable, or any goods, merchandise, or other article from any other person who may have found the same, knowing the same to have been so found, the master, mate or other person having the command of such ship or vessel shall, on the return or arrival of such vessel to any port of the united kingdom, place the said article at the disposal of the receiver in or nearest to such port at which he shall first arrive, and within twenty-four hours of his arrival, with a report in writing containing an accurate description of the said articles, and the marks, if any, thereon, and the time when, and the bearings and distances and other minute descriptions of the place where the same were found or taken on board; and such receiver is hereby required to transmit such report to the secretary of the committee of Lloyd's aforesaid, to be placed by him for inspection, in like manner as \* hereinbefore provided with respect to copies of other reports; and if the said article shall not be claimed by the owner thereof, or his agent, within twelve calendar months after such report shall be transmitted to the said secretary, the same shall be sold and disposed of by the said receiver, and the proceeds of such sale remain and be dealt with in the manner hereinbefore directed with respect to other unclaimed

articles ; and if the master of such ship or vessel, or such other person, shall not report, or place at the disposal of the said receiver, such vessel, boat, anchor, cable, goods, merchandise, or other article, according to the provisions of this act, he shall for every such offence forfeit all claim to salvage, and on being thereof convicted before any justice of the peace, forfeit and pay one hundred pounds, and shall also forfeit and pay double the value of any such article to the owner thereof, if claimed, or to her Majesty if the same become droits of admiralty, which double value may be recovered in the same manner as a penalty under this act.

31. And be it enacted, That every person who shall convey, take, or tow to any foreign port or place any vessel, boat, anchor, chain, cable, or other article, which may have been so found, weighed, swept for, received, or taken as aforesaid, and there sell or otherwise dispose of the same, shall be guilty of felony, and shall be transported for any term not exceeding seven years.

32. And be it enacted, That all persons who shall trade or deal in buying and selling anchors, cables, sails, or old junk, old iron, or marine stores of any kind or description, shall have their names, with the words "dealer in marine stores," painted distinctly in letters of not less than six inches in length upon the front of all their storehouses, warehouses, and other places of deposit for such goods, and in default of their so doing they shall, on conviction before any justice of the peace or any magistrate of any jurisdiction where such storehouse, warehouse, or depot shall be, forfeit and pay a sum not exceeding twenty pounds ; and it shall not be lawful for such dealers or traders to cut up any cable or any part of a cable exceeding five fathoms in length, or uncant, untwine, or unlay the same into junk or paper stuff, on any pretence whatsoever, without first obtaining a permit from a justice of the peace, or the receiver residing nearest to the residence of such dealer, which permit shall not be granted unless a declaration shall have been made before a justice of the peace that the cable or other articles so intended to be cut up had been *bonâ fide* purchased, and without fraud, by the party so intending to cut up the same, and without any knowledge or suspicion on his part that the same had been dishonestly come by, and in which declaration shall also be specified the peculiar quality and description of such cable or other article, and the name of the seller thereof ; which declaration shall be recited and set forth at length upon the permit thereupon granted, on pain of forfeiting for the first offence any sum not exceeding twenty pounds, and for the second or further offence any sum not exceeding fifty pounds.

33. And be it enacted, That it shall not be lawful for any dealer in marine stores, or any person employed by him, to purchase anchors, cables, \* sails, or old junk or iron, or marine stores of any kind or descrip- [ \* 18 ] tion whatsoever, of or from any person who shall not have attained the age of fourteen years, on pain of forfeiting for the first offence any sum not exceeding five pounds, and for the second or further offence any sum not exceeding twenty pounds.

34. And be it enacted, That for the more effectual prevention of such frauds all dealers in such marine stores as aforesaid shall keep a book or books fairly written, in which entries shall be from time to time regularly made of

all such old marine stores as shall be by them from time to time bought or otherwise obtained, containing a true account and description of the times when the same were so respectively bought or otherwise obtained by them, and of the names and places of abode of the respective sellers thereof, or of the parties from whom the same shall have been obtained; and before any person who shall obtain such permit as hereinbefore mentioned for the cutting up of any such cable or other article shall proceed to cut up the same by virtue thereof, there shall be published, by the space of one week at least before the cutting up of the same, one or more advertisements in some public newspaper printed nearest to the storehouse, warehouse, or depot where the article shall be deposited, notifying that such party had obtained such permit for the purpose of cutting up such cable or other article, and of such kind and quality as therein described, and also specifying the place where such articles are deposited; whereupon it shall be lawful for every person who may have just cause to suspect that such articles are his property, and shall have verified upon oath the fact of such suspicion before any justice of the peace or magistrate residing near the said storehouse, warehouse, or depot, by warrant for that purpose thereupon granted, to require of and from such dealer who shall have so advertised as aforesaid the production and examination of the books of entries hereby required to be kept, and to inspect and examine the cables and other articles described in such permit; and in case any such dealer, when so required as aforesaid, shall neglect or refuse to produce such book of entries, or shall neglect to keep any such book of entries, or shall refuse to permit such inspection or examination as aforesaid, or shall, after obtaining such permit for the cutting up of any such cable or other article, or before cutting up the same, neglect to publish such advertisement as aforesaid, he shall for every such first offence forfeit and pay any sum not exceeding twenty pounds, and for every such second or further offence any sum not exceeding fifty pounds.

35. And be it enacted, That every manufacturer of anchors and kedge anchors shall place his name or initials, together with a progressive number, and also the weight of every anchor, in legible characters upon the crown and also upon the shank under the stock of each anchor respectively which he shall manufacture; and in case any such manufacturer shall neglect to place such name, number, or weight in the manner hereinbefore directed and required, he shall for every such neglect forfeit and pay any sum not exceeding five pounds.

[ \* 19 ] \* 36. And be it enacted, That any penalty imposed by this act may be recovered by information or action of debt in any of her Majesty's courts, or by information or complaint before any justice of the peace or magistrate of any jurisdiction residing near the place in which the offence has been committed for which such penalty is sought to be recovered, or where the offender may at any time happen to be, and (except where the contrary is so expressed) one half of the said penalties shall go to the informer, and the other half to the receiver general of droits of admiralty, to be applied by him in like manner as the proceeds arising from such droits, any thing in an act passed in the sixth year of the reign of his late Majesty King William the Fourth, intituled " An Act to provide for the Regulation of Muni-

cipal Corporations in England and Wales,"<sup>1</sup> or in any other act of parliament, to the contrary notwithstanding; and in case any of the said penalties, on conviction by any justice of the peace or magistrate, shall not be paid, with the charges incident to the conviction, immediately upon such conviction, the same shall and may (except in the case hereinafter mentioned) be levied, by warrant under the hand and seal of such justice or magistrate upon the goods and chattels of any such offender; and in case no sufficient distress shall be found, then every such offender shall and may be committed by any justice or magistrate as aforesaid to gaol, with or without hard labor, in case of any first offence for any period not exceeding six calendar months, and in case of any second or further offence for any period not exceeding twelve calendar months, unless the said penalty and the charges shall be sooner paid; and for the more easy and speedy conviction of such offenders, every such justice or magistrate before whom any person shall be convicted of any offence against this act shall and may cause the conviction to be drawn up according to the following form; (videlicet,)

"Be it remembered, That on the       day of       in the year of our Lord A. B. is convicted before me [*or us,*] one [*or two, as the case may be*] of her Majesty's justices of the peace for the [*here specify the offence, and the time and place when and where committed, as the case may be*, contrary to an act passed in the       year of the reign of Queen Victoria, intituled [*here insert the title of this act.*] Given under my hand and seal [*or our hands and seals,*] the year and day first above written."

And no *certiorari* or other writ or process for the removal of any such conviction, or any proceedings thereon, into any of her Majesty's courts of record at Westminster or elsewhere, shall be allowed or granted.

37. And be it enacted, That it shall be lawful for any person so convicted by any justice of the peace or magistrate before-mentioned of any offence against this act, within three calendar months next after such conviction, to appeal to the justices of the peace assembled at the general quarter sessions holden for the county, city, or place where the matter of appeal shall arise, first giving ten days notice of such appeal to such justices of the peace or magistrate, and of the matter thereof, and entering into a recognizance \* before some justice of the peace for such county, city, or [ \* 20 ] place, with two sufficient sureties, conditioned to try such appeal, and for abiding the determination of the court therein; and such justices at the general quarter sessions shall, upon due proof of such notice having been given and recognizances entered into, hear and determine the matter of such appeal, and may either confirm or quash and annul the said conviction, and award such costs to either party, as to them shall seem just and reasonable; and the decision of the said justices therein shall be final, binding, and conclusive; and no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form only, or be removed by *certiorari*, or any other writ or process whatsoever, into any of her Majesty's courts at Westminster or elsewhere; any law or statute to the contrary in anywise notwithstanding.

38. And be it enacted, That all felonies, misdemeanors, and other offences

against this act, except in the case of summary convictions, may be laid to be committed and may be tried in any city, county, or place where any such article, matter, or thing in relation to which such offence shall have been committed shall have been found in the possession of the person committing the offence, or the offender may at any time happen to be.

39. And be it enacted, That it shall be lawful to and for the commissioners of customs and excise, and they are hereby required, to permit all goods, wares, and merchandise saved from any vessel stranded or wrecked on its homeward voyage to be forwarded to the port of its original destination, and also to permit goods, wares, and merchandise saved from any vessel stranded or wrecked on their respective outward voyage to be returned to the port at which the same were shipped; but such commissioners are to take security for the due protection of the revenue in respect of such goods, wares, and merchandise.

40. And be it enacted, That the High Court of Admiralty shall have jurisdiction to decide, in manner hereinbefore mentioned, upon all claims and demands whatsoever in the nature of salvage for services performed, except in cases of goods hereinbefore directed to be sold as droits of admiralty, whether in the case of ships or vessels, or of any goods or articles found either at sea or cast upon the shore, and whether such services shall have been performed upon the high seas or within the body of any county, any thing in any act contained to the contrary notwithstanding.

41. And be it enacted, That in every case in which any damage shall be done by any foreign ship or vessel to any ship or vessel, barge, boat, or other craft belonging to her Majesty, or any of her subjects, whether abroad or otherwise, or to any buoy or beacon in any harbor, port, river, or creek, or within three miles of the coast of the United Kingdom, and it shall appear on a summary application made to any judge of any of her Majesty's courts of record at Westminster or elsewhere, or to the judge of the High Court of Admiralty respectively, that such damage or loss has probably been sustained or arisen by the misconduct or negligence of the master or mariners of such foreign [ \* 21 ] ship or \* vessel, then and in every such case it shall be lawful for any such judge to cause such foreign ship or vessel, being in any harbor, port, river, or creek, or other place within three miles of the coast of the United Kingdom, to be arrested and detained until the master or owner or consignee of such ship or vessel shall undertake to appear and be defendant in any action which may be brought for such loss or damage, and give such sufficient security, by bail or otherwise, for all costs and damages, if recovered, as shall be directed and be ordered by such judge, if it shall upon the trial of such action or suit appear that such loss or damage shall have arisen from such negligence or misconduct as aforesaid; and in such action or suit the person giving security shall be made defendant, and shall be stated to be the owner of the foreign ship or vessel doing such damage; and it shall not be necessary in any such action or suit to give any other evidence of the liability of such person to such suit or action than the production of the order of the judge made in relation to such security as aforesaid; and any collector or comptroller of the customs shall, upon notice served upon him of the fact of such application



having been made as aforesaid, have power and is hereby required to detain such ship or vessel until the result of such application shall be made known.

42. And be it enacted, That within the jurisdiction of the Cinque Ports every sergeant of the lord warden of the Cinque Ports and his deputy shall have the same power and authority, and be liable to the same duties and services, as are hereinbefore enacted with respect to the said receivers of droits of admiralty, and all provisions in this act contained relating to such receivers shall, within the jurisdiction aforesaid, extend and apply to the said sergeants and their deputies in as full and ample a manner as if the same were now again in that behalf set forth and repeated; save and except that the reports hereinbefore directed to be sent by the said receivers to the said receiver general shall, within the jurisdiction of the Cinque Ports, be sent by the said sergeants or deputy sergeants to the said lord warden; and every fee or other gratuity to be paid to the said sergeants or deputy sergeants shall be regulated according to the judgment of the said lord warden for the time being.

43. Provided always, and be it enacted, That nothing whatsoever in this act contained shall extend or be construed to extend so as in any manner to affect, impeach, alter, abridge, or interfere with the rights, privileges, authority, or jurisdiction of the said lord warden, or of the said Cinque Ports, two ancient towns and members thereof, or in any manner to affect, repeal, or interfere with the provisions of an act passed in the first and second years of the reign of his Majesty King George the Fourth, intituled<sup>1</sup> "An Act to continue and amend certain Acts for preventing the various Frauds and Depredations committed on Merchant Ship-owners by Boatmen and others within the Jurisdiction of the Cinque Ports; and also for remedying certain Defects relative to the Adjustment of Salvage under a Statute made in the Twelfth Year of the Reign of Her late Majesty Queen Anne."

\* 44. And be it enacted, That if any ship or vessel which may be [ \* 22. ] in distress, wrecked, or stranded, or run on shore, or any part of the cargo thereof, shall be plundered, damaged, or destroyed, wholly or in part, near to or on any of the coasts of England, Wales, or Ireland, or in any of the harbors, havens, rivers, creeks, or bays thereof, by any persons riotously and tumultuously assembled together, whether on shore or afloat, in every such case the inhabitants of the hundred, wapentake, ward, barony, half barony, or other district in the nature of a hundred, by whatever name it shall be denominated, in which or nearest to which the said offence shall be committed, shall be liable to yield full compensation to the owner of such ship or vessel, or of the cargo or any part of the cargo thereof, in the same manner in England and Wales as is provided in cases of the destruction of churches and other buildings by a riotous-assemblage, by an act passed in the session of parliament holden in the seventh and eight years of the reign of his late Majesty King George the Fourth, intituled<sup>2</sup> "An Act for consolidating and amending the Laws in England relative to Remedies against the Hundred;" and all the clauses and provisions contained in the said last-mentioned act shall be held to

<sup>1</sup> 1 & 2 Geo. IV. c. 76.

<sup>2</sup> 7 & 8 Geo. IV. c. 31.



apply to all such cases of plundering, damaging, or destroying any such ship or vessel, or the cargo thereof, by any such riotous assemblage as aforesaid, as fully and effectually and to all intents and purposes as if the said several clauses and provisions had been particularly repeated and reenacted in the body of this act; and in Ireland compensation shall be recovered, and presented, applotted, levied, and paid over to the said owner, in like manner and by like proceedings as are provided for by the recovery of satisfaction and amends for the malicious demolition of or injury to churches, chapels, and other buildings used for religious worship according to the usage of the united church of England and Ireland, by an act passed in the session of parliament holden in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled<sup>1</sup> "An Act to alter and amend the Laws relating to the Temporalities of the Church in Ireland," or by any act amending the same.

45. And be it enacted, That every person who shall wrongfully carry away or remove any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or article of any kind belonging to such ship or vessel, or (unless the same person shall be a receiver or other officer, or justice, hereinbefore authorized to give orders in cases of wreck as aforesaid,) shall enter or endeavor to enter on board of any such ship or vessel as aforesaid, without the consent or leave of the master, commander, or other superior officer thereof, or of a receiver or other officer so authorized to give orders in cases of wreck, or shall molest or impede any person employed in the saving of such ship or vessel or goods as aforesaid, or shall endeavor to impede or hinder the saving of any ship or vessel or goods as aforesaid, shall for every such offence forfeit and pay any sum not exceed-

ing fifty pounds; and where any such person shall have been de-  
[ \* 23 ] tained, or taken before any justice of the peace, \* for any such offence,

it shall be lawful for such justice of the peace to proceed summarily on the case without any information, and to convict such person of such offence, and in default of payment of such penalty to commit such person to any of her Majesty's gaols for any time not exceeding six months, with or without hard labor; and it shall be lawful for the said master, commander, or superior officer of the said ship or vessel so in distress as aforesaid, or the said receiver or other officer hereinbefore authorized to give order in cases of wreck, respectively to repel by force any such person as shall, without such leave or consent as aforesaid, press on board such ship or vessel: Provided always, that nothing herein contained shall be construed to repeal or in anywise affect or alter any provision contained in an act passed in the seventh year of the reign of his late Majesty King William the Fourth, and first year of the reign of her present Majesty Queen Victoria, intituled<sup>2</sup> "An Act to amend the Laws relating to Robbery and stealing from the Person."

46. Provided always, and be it enacted, That nothing in this act contained shall be construed to alter or repeal any of the clauses or provisions contained in an act passed in the sixth year of the reign of his Majesty King George the

<sup>1</sup> 3 & 4 Will. IV. c. 37.

<sup>2</sup> 7 Will. IV. & 1 Vict. c. 87, s. 8.

Fourth, intituled<sup>1</sup> “An Act for the Amendment of the Law respecting Pilots and Pilotage; and also for the better Preservation of floating Lights, Buoys, and Beacons;” nor any of the clauses or provisions contained in an act passed in the session of parliament holden in the seventh and eighth years of the reign of his late Majesty King George the Fourth, intituled<sup>2</sup> “An Act for consolidating and amending the Laws in England relative to Larceny and other Offences connected therewith;” nor any of the clauses or provisions contained in an act passed in the ninth year of the reign of his late Majesty King George the Fourth, intituled<sup>3</sup> “An Act for consolidating and amending the Laws in Ireland relative to Larceny, and other Offences connected therewith;” nor any of the clauses or provisions contained in an act passed in the sixth and seventh years of the reign of her present Majesty Queen Victoria, intituled<sup>4</sup> “An Act to carry into effect a Convention between Her Majesty and the King of the French concerning the Fisheries in the Seas between the British Islands and France;” nor any of the clauses or provisions contained in an act passed in the parliament of Ireland in the thirty-fifth year of the reign of his Majesty King George the Third, intituled<sup>5</sup> “An Act for repairing and preserving the Walls of the River Anna Liffey in the City of Dublin; and for amending an Act passed in the twenty-sixth year of his Majesty’s reign, intituled ‘An Act for promoting the Trade of Dublin by rendering its Port more commodious.’”

47. Provided also, and be it enacted and declared, That neither this act nor any thing herein contained shall in anywise extend or be construed to extend to deprive or in any way prejudice the rights of her Majesty, her heirs or successors, nor to the taking away, abridging, or impeaching in any manner whatever the jurisdiction of the High Court of Admiralty, or the jurisdiction of the Admiralty Court of the Cinque Ports, two ancient towns and their

\* members, but it shall and may be lawful for the said courts respectively, [ \* 24 ] and the judges thereof for the time being, to have, use, exercise, and enjoy jurisdiction over all such matters, rights, and offences as they have heretofore used, exercised, and enjoyed, as fully and effectually, to all intents and purposes whatever, as if this act had not been made, any thing herein contained to the contrary thereof in anywise notwithstanding.

48. Provided also, and be it enacted and declared, That nothing herein contained shall extend or be construed to extend to the taking away, abridging, hindering, prejudicing, or impeaching of any grant, liberties, franchises, and privileges heretofore granted to and vested in the corporation of the Trinity House of Deptford Strond, or in that of the Trinity House of Kingston-upon-Hull, or in the commissioners acting under the provisions of any act of parliament relating to the adjustment of salvage for anchors, cables, and other ships’ materials found in the River Humber, or in the master, wardens, and brethren of the Trinity House of Newcastle-upon-Tyne, respectively, but that the said corporations and the said commissioners, and the said masters, wardens, and brethren shall hold and enjoy the same as fully and effectually, and to all

<sup>1</sup> 6 Geo. IV. c. 125.

<sup>2</sup> 7 & 8 Geo. IV. c. 29.

<sup>3</sup> 9 Geo. IV. c. 55.

<sup>4</sup> 6 & 7 Vict. c. 79.

<sup>5</sup> 32 Geo. III. c. 35.

intents and purposes, as they might have done in case this act had never been made, any thing herein contained to the contrary notwithstanding.

49. And be it enacted and declared, That nothing in this act shall extend or be construed to extend to prejudice or take away any right, property, authority, or jurisdiction of the mayor of the city of London, or of the mayor and commonalty and citizens of the city of London, to, in, and upon the rivers Thames and Medway respectively.

50. And be it enacted, That this act shall extend to all parts of the United Kingdom except Scotland.

51. And, for the interpretation of this act, be it enacted, That the following terms and expressions, so far as they are not repugnant to the context of this act, shall be construed as follows ; (that is to say,) the expression " Commissioners of the Treasury " shall mean " The Lord High Treasurer for the time being, or the Commissioners of her Majesty's Treasury for the time being, or any three or more of them ; " and the expression " Commissioners of Admiralty " shall mean " The Lord High Admiral of the united kingdom of Great Britain and Ireland for the time being, or the Commissioners for executing the office of such Lord High Admiral, or two or more of them ; " and the expression " High Court of Admiralty " shall mean the High Court of Admiralty of England, or the High Court of Admiralty of Ireland, according as the case may arise within the jurisdiction of one or the other of the said courts ; and the singular number shall mean and apply to the plural as well as the singular number ; and the masculine gender shall mean and apply to the feminine gender as well as the masculine gender.

52. And be it enacted, That this act may be amended or repealed by any act to be passed in the present session of parliament.

## SCHEDULES REFERRED TO IN THE FOREGOING ACT.

[ \* 25 ]

## \* SCHEDULE (A.)

On the                      day of                      in the year of our Lord  
before, &c.,                      at                      in the county of

(Ship's Names.)

(Master's Names.)

A. B. [*here insert the names of the salvors,*] against the said ship whereof                      was master, her tackle, apparel, and furniture, and the goods, wares, and merchandise on board the same, and also against the said                      master, and the owners of the said ship and cargo, [*or, as the case may be,*] against certain goods and merchandise lately laden on board the said ship, whereof                      was master, and also against the said

master and the owners [*(or, if the owners alone appear by themselves or their agents, then leave out the master's names,*) of the said goods and merchandises, (*or, as the case may be*) against certain goods and merchandises, and the owners of the said goods and merchandises,] in a case of salvage.

On which day appear personally W. X. of                      and Y. Z. of                      who produced themselves as sureties for the said                      the master, and for the owners of the said ship and cargo, [*or, as the case may be,*] for the said                      master and owners, [*or, as the case may be,*] for the said                      owners of the said goods and merchandises, and submitting themselves to the jurisdiction of the High Court of Admiralty of England, [*or the High Court of Admiralty for Ireland, or the Court of Admiralty for the Cinque Ports, as the case may be,*] bound themselves, their heirs, executors, and administrators, for the said master and owners of the said ship and cargo, [*or, as the case may be,*] for the said master and owners, [*or for the owners of the said goods and merchandises,*] in the sum of                      pounds of lawful money of Great Britain, unto the said A. B., &c., to answer the salvage and expenses of the said ship and cargo, [*or, as the case may be,*] on the said goods and merchandises, as shall hereafter be deemed by the said court, according to the tenor of the act in that behalf made and provided; and, unless they shall so do, they hereby consent that execution shall issue forth against them, their heirs, executors, and administrators' goods and chattels, wheresoever the same shall be found, to the value of the sum above mentioned.

This bail was duly taken, acknowledged, and received at the time and place above written, before me, the undersigned receiver of droits of admiralty ; and I do hereby further certify, that I do believe and consider the persons above-mentioned sufficient security for the sum of pounds.

W. X.  
Y. Z.

[ \* 26 ]

SCHEDULE (B.)

To A. B. of

In the matter of the vessel of , whereof  
C. D. was master, [or goods salved at .]

Take notice, That the whole sum paid over to me, to be distributed for salvage services rendered to the above-mentioned vessel [or goods,] on the day of , 184 , is £ . That the sum allotted to you is £

E. F.  
Distributor.

Dated this day of , 184 .

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9

**R E P O R T S**  
**OF**  
**C A S E S**  
**ARGUED AND DETERMINED**  
**IN THE**  
**HIGH COURT OF ADMIRALTY,**  
**COMMENCING WITH**  
**THE JUDGMENTS**  
**OF THE**  
**RIGHT HON. STEPHEN LUSHINGTON.**

**BY WILLIAM ROBINSON, D. C. L.**  
**ADVOCATE.**

*"Ea verè præstabilis est scientia quæ in fœderibus pactionibus conditionibus populorum regum  
externarumque nationum in omni denique belli jure et pacis versatur." — CICERO.*

**EDITED BY GEORGE MINOT,**  
**COUNSELLOR AT LAW.**

**VOLUME III.**  
**PARTS I. AND II.**

**1847 – 1850.**

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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY.

---

THE CATHERINE.<sup>1</sup>

June 11, 1847.

Question as to the costs of a reference to the registrar and merchants. Where a bond is pronounced for, and upon being referred to the registrar and merchants large deductions are made in the registrar's report, the party setting up the bond will be liable to the costs of the reference.

*Semble*, the main consideration in the judgment of the court will be the amount of the sum deducted in proportion to the sum which is claimed.

THIS was a question as to the costs of a reference to the registrar and merchants in a cause of bottomry. The bond was given by the master for the sum of 3,099*l.*, and its validity being admitted, a reference to the registrar and merchants was decreed in the usual form at the prayer of the owners of the vessel. The registrar and merchants in their report disallowed various items and charges in the bond, amounting in the whole to the sum of 2,600*l.* This report was not objected to, and was confirmed by the judge; and the owners of the vessel having moved the court to condemn the bondholders in the whole costs of the reference to the registrar and merchants, the bondholders prayed to be heard upon their act on petition in objection thereto.

The question of the costs was argued by *Haggard* and *Harding* for the bondholders.

*Addams* and *Bayford*, *contra*.

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<sup>1</sup> [S. C. 5 Notes of Cases, 398.]



[ \* 2 ]      \* JUDGMENT.

In delivering my judgment in this case, I think it expedient to notice in the first instance some few of the circumstances under which the question now comes before the court. It appears that the vessel proceeded against was stranded on the coast of Portugal, in April, 1845, and that certain repairs became necessary to enable her to prosecute her voyage to England, whither she was bound with a cargo of wine. In order to meet the expenses of these repairs, a bond of bottomry was given by the master in the sum of 3,099*l*. ; and upon the arrival of the ship in this country in the month of July, or beginning of August, 1845, a warrant of arrest was extracted, and an action was commenced in this court by Mr. Poynter, on behalf of Messrs. Grant & Bell, who describe themselves in their affidavit as the agents of Mogardo & Co., to whom the bond was originally given. The bond itself is indorsed in these words — "Pay to Bell & Grant, or order, of London, the within-named sum. Dated Olhao, 7th July, 1845." Whether the indorsement is to be considered as a *bonâ fide* assignment of the bond to Messrs. Bell & Grant, or whether it is so indorsed to them merely as the agents of Mogardo & Co., it is wholly immaterial to inquire. In either character they would, I conceive, stand precisely in the same position as the original bondholder, and would be entitled to the same advantages, and be subjected to the same liabilities in law and equity to which he would have been subject. The proceedings having been commenced in this court as stated, on the 3d of September an appearance was given by Mr. Clarkson for the owners of the ship, and the bond being admitted by him before a surrogate, the surrogate pronounced for its vali-

[ \* 3 ]      dity \* and ordered the accounts to be referred to the registrar and merchants. The effect of such a decree, according to the usage of the Court of Admiralty, is, I apprehend, conclusive upon the validity of a bond, and, unless appealed from, the bond must be considered as a valid bond ; at the same time it determines nothing with respect to the amount of money that the bondholder is entitled to recover from the owners of the vessel. This is to be ascertained by the subsequent reference to the registrar and merchants. The practice of so pronouncing for the bond by consent and referring the amount to the registrar and merchants, is a practice which, in my judgment, is most convenient, and at the same time most beneficial to the parties interested in the suit. By this mode of proceeding the party promoting the suit obtains at once the realization of his security, whether it be the ship, cargo and freight, or the value of these as represented in the bail. On the other hand, the party proceeded against is no less benefited in having the real extent of his liability

ascertained by persons competent to the investigation, and that at a comparatively small and moderate expense. Where a reference to the registrar and merchants is directed, the court, unless called upon by the parties themselves, never interferes until the registrar's report is made. In the present case no application whatever was made to the court during the long period that intervened, the reference being directed in September, and the report of the registrar being made in the month of December. It cannot, therefore, be said that ample time was not given to the parties claiming under the bond to establish their rights. I say, "establish their rights," because in all questions of this kind the *onus probandi* lies in the first instance [ \* 4 ] upon the plaintiff in the suit, and he is bound to show what he has expended in the service of the ship, and what he is entitled to recover under the bond. In having this obligation cast upon him, the bondholder has no right to complain of suffering any hardship. He ought to keep regular accounts, and to take regular receipts, and to produce these when required; and if these accounts are found to be fair and just, he is entitled to all his expenses in establishing his claim. What then is the result of the registrar's report in this case? It is this — that from the claim of 3,099*l.*, the amount of the sum sued for, the registrar and merchants have deducted no less a sum than 2,688*l.*, and this report has been confirmed by the court, and has not been objected to. Under such a state of circumstances, what is the principle to be applied in respect of the costs of the reference to the registrar and merchants? It is, I apprehend, the same principle that would be applied in other courts of law and equity, namely, that if a party sets up an exorbitant and extortionate demand, the party preferring such demand must pay the expense of the party resisting it. I do not mean to say that in ordinary references to the registrar and merchants, where small items may be disallowed, this principle would apply. The main consideration which must govern the judgment of the court in every case must be the amount of the sum which is taken off in proportion to the demand which is claimed. Where, as in this case, so large a proportion of the sum originally claimed is disallowed, I should have no hesitation in holding that *prima facie* the party setting up the claim had made an exorbitant and extortionate demand, and must indemnify the party resisting it in all the expenses to which he has been put in so doing. Let me now shortly [ \* 5 ] consider what in the present instance has been stated on behalf of the bondholders in this case, either in their answer to the act on petition, or in the arguments of their counsel. It has been urged by Dr. Haggard that this is the first instance in which the court has been called upon to visit a bondholder with a loss of this descrip-

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The Catherine. 3 W. Rob.

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tion, because a large amount of the sum claimed has been disallowed. It has also further been urged, that, as regards the merits of the original cause, no blame whatever is imputable to Messrs. Bell & Grant, to whose hands the bond was legally consigned, and that they have acted with a perfect *bona fides* throughout the whole of the proceedings in this court. Assuming that both these positions are correctly stated, how can they affect the real question which I have to determine? Whether this is the first or one hundredth case that has occurred, it must stand upon the same great principle of justice to which I have already adverted, namely, that where a party prefers an extortionate claim, which has no substantial foundation in truth, he is bound to indemnify the party whom he brings before the court in all the expenses incurred in the resistance of such claim. Again, with regard to the *bona fides* of Messrs. Grant & Bell, in reference to the proceedings in this court, I do not apprehend that I am in any measure called upon to give any opinion whatever upon their conduct. I have already observed that they stand in the same position as Mogardo & Co., to whom the bond was given, and are entitled to the same privileges and subject to the same liabilities to which he would be subject. If in the character of agents they have, in obe-

dience to their employer's instructions, put the process of the  
[ \* 6 ] court wrongfully in motion in demanding \* the sum of 3,099l.

they must bear the consequences; and they have no reason to complain, inasmuch that they take their commission upon the ground of the risks which they incur on the faith and credit of the parties for whom they act.

I will now shortly refer to the substance of the answer to the act on petition. After detailing the proceedings before the registrar and merchants, &c., it sets forth to this effect: (Court here read and commented upon parts of the answer, and proceeded to observe) — Now, supposing all that is stated in this answer to be true, what is the result? According to the determination of the registrar and merchants, — a determination sanctioned by the authority of the court, and not objected to by the parties themselves, — no less a sum than 2,600l. has been overcharged and overdemanded. Can I, sitting here as a judge of this court, and looking at this fact, hesitate for a single moment as to the conclusion to which I must come? I consider it my duty, in the first place, in justice to the party proceeded against, and who has been unnecessarily and improperly put to an enormous expense, to protect him from suffering further loss by throwing upon him any further expenses of this reference to the registrar and merchants. I further consider it my duty, as regards the protection of the mercantile interests in general, and as a warning in future cases,

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The Mellona. 3 W. Rob.

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strongly to express my disapprobation of the exorbitancy of the demand which has been set up in the present instance; and I wish it to be understood that as long as I have the honor to preside in this chair, I will, to the utmost extent of my power, not only on behalf of the owners of British vessels, but of any other ships, endeavor to prevent a repetition of the discreditable proceeding which has taken place in \*this case. I condemn the bondholder in the [ \* 7 ] whole costs of the reference, and, as a matter of course, in the costs of this proceeding.

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THE MELLONA,<sup>1</sup> Beale.

July 14, 1847.

Where a vessel, having been run down, subsequently becomes unmanageable, and gets upon a sand bank and is lost, the presumption of law is, that her eventual loss is attributable to the effects of the collision, and not to the mismanagement of the persons on board.

THIS was a cause of damage by collision, promoted by the owner of the brig George, against this vessel, her tackle, apparel, &c. &c.

The proceedings were by plea and proof, and the libel of the owners of The George, consisting of nine articles, in substance pleaded—That The George was proceeding from Newcastle, bound to West Cowes, with a cargo of coals, and on the evening of the 5th of March, 1845, she (with several other vessels then in company) was tacked off the land in order to go well outside of the Newarp Sand; that whilst so proceeding, at about ten, P. M., the wind then blowing strong, from E. N. E., the weather being thick and hazy and the night dark, a vessel, which proved to be The Mellona, was observed nearing The George on the larboard tack; that The Mellona was repeatedly hailed by the watch of The George, but no attention was paid to such hailing, and she continued her course without alteration, and struck The George with her larboard bow just abaft the fore rigging on the larboard side; that the damage sustained by The George was so great that it was apprehended she would immediately sink, whereupon all her crew, with the exception of the mate, jumped on board The Mellona, but three of them subsequently returned to their own vessel;

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<sup>1</sup> [S. C. 5 Notes of Cases, 450.]

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The Mellona. 3 W. Rob.

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that shortly after the two vessels had separated, The George became unmanageable, and whilst passing through the Cockle Gat [ \* 8 ] towards Great Yarmouth Roads, she missed stays and got upon the Barber Sand, and immediately became a wreck and was totally lost, three of her crew being washed off the bowsprit and drowned; that the collision was occasioned solely by the fault, mismanagement and want of skill of the persons on board The Mellona. An allegation consisting of five articles was given in by the owners of The Mellona in answer to the libel, and the allegation in substance pleaded, "that The Mellona, of 106 tons burden, was proceeding from the port of Shields, bound to the island of Guernsey, with a cargo of coals; that about half-past nine, P. M., of the 5th of March, she was reaching upon the larboard tack between Hasborough and Winterton, when a brig was observed, between the snow squalls, a short distance to leeward and reaching upon the same tack, but was soon afterwards, in consequence of a heavy snow-fall, lost sight of; that in about an hour afterwards, after the fall of another heavy snow-fall, the Newarp light-ship was seen right ahead, about a mile distant, no other object being visible at the time; that the schooner kept her reach upon the larboard tack for the purpose of going out of the Gat, and at about eleven, P. M., the weather at such time being so thick and dark that no object was discernible half a ship's length off, The George, suddenly and without any previous hailing from on board, came violently into contact with The Mellona on the starboard bow, and thereby greatly injured her hull, spars and rigging; that the weather throughout the whole of the night continued dark and thick, with frequent squalls of snow, and that the passage through the Cockle Gat in such weather was a very dangerous navigation; that in consequence thereof The Mellona was hove to until daylight, and the persons on board The George [ \* 9 ] ought \* as a matter of prudence to have done the same, and that the loss of The George was occasioned altogether by the master endeavoring to run her through the said Cockle Gat in the dark."

The case was argued before Trinity Masters by *Addams* and *Robinson* for The Mellona.

*Queen's Advocate* and *Bayford* for the owners of The George.

\* JUDGMENT.

DR. LUSHINGTON. Gentlemen, the first question we have to determine in this case is, whether the collision arose from the misconduct of either of the two vessels, or whether it was the result of inevitable

accident. Assuming that the collision was occasioned by the default of the persons on board The Mellona, we shall then have to consider, secondly, whether the subsequent loss of The George is to be attributed to the want of skill and improper conduct of the master, who, with two of the seamen, it is much to be regretted, was unfortunately drowned. Before I proceed to direct your attention to those considerations, upon which I apprehend your judgment must ultimately be founded, I will shortly advert to some of the observations which have been made by the counsel in the cause with respect to the delay that has intervened between the time of the collision and the commencement of proceedings in this court. It has been pressed by the counsel for The Mellona, that there has been an unnecessary delay, and in some of the pleadings averments were introduced for the purpose of inducing the court to come to that conclusion. I thought it my duty to direct these averments to be \*struck out of the pleas for two [ \* 10 ] reasons; in the first place, because it was obvious that the insertion of them must necessarily have led to counter averments on the other side, which would have occasioned considerable delay and expense. Another reason which operated upon my mind was, that the owners of The Mellona, who are resident in Guernsey, refused to give an appearance in this court; and without their consent to give such appearance, it is well known that any proceedings against them personally could not be entertained. I may here tell you, gentlemen, that, as judge of this court, I have no authority to refuse to entertain a suit brought by a party alleging himself to be aggrieved, provided the suit is commenced within the period of time limited by law. At the same time, if I saw any unreasonable or improper delay, I should in all cases, when the proof was not sufficiently clear to enable me to arrive at a satisfactory decision, consider that such delay in the proceedings raised a presumption against the party guilty of the laches, inasmuch that valuable and important evidence might have been lost in consequence thereof. In the present instance it is clear that the promoters of this suit have brought their action far within the time limited by law; and it is, I think, equally clear, that there is nothing to show that any loss of evidence has been sustained, for we have the evidence of all the parties who could be examined, and I see no reason to suspect that their memories are unfaithful, or that they have given testimony in any respect with a wilful disregard to truth. Having premised thus much in respect to the delay which is imputed to the owners of The George, I must now request your attention to two points in the case, which, in my view of it, are of the greatest \*importance, namely, what was the state of the two ves- [ \* 11 ] sels as regards the conduct of their crews, and what the state



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of the weather at the moment immediately preceding the collision. With respect to the latter point, it appears to me that the result of the evidence clearly shows that the night was exceedingly dark and stormy, and that the snow was frequently falling, which rendered it extremely difficult to see any object when almost in immediate proximity. Whether a snow squall was absolutely prevailing at the time, or the snow was merely falling, is not of any material importance; there is, in my judgment, sufficient evidence to establish that the night was so dark, and the difficulty of seeing so great, that if there was no negligence on either side, the collision would be attributable to inevitable accident. Such, gentlemen, being the state of the weather, how does the case stand in regard to the conduct of the crews of the two vessels? With respect to The George, you will observe that no blame whatever is imputed to the master and crew of that vessel as to any thing that was done on board her antecedent to the collision. The inquiry, therefore, must be confined to the conduct of the persons on board The Mellona. The master of that vessel states in his protest to this effect: "that the weather was so thick that he could not discern any object, although he had two men on deck on the look-out, besides himself, and that in this state of things The George was suddenly observed in their starboard bow." According to this representation, it would appear that the master was himself on deck, and assisted in keeping a look-out at the time of the collision. This would be a most important circumstance, if it were truly and correctly stated. There is, however, another statement before the court, to which I must call your attention. I mean the account given by the master, upon oath, in his deposition in chief to the first article of the allegation. He there swears in these words:—"At about eleven o'clock of the said night the said schooner was still lying out south-east. Just at that moment I stepped down in the cabin to look at my chart; up to that moment I had been on deck the whole evening, keeping a look-out forward with Christopher Wilson, one of the men. At that moment it was so thick and dark that no object was discernable at so great a distance as half a ship's length off; you could not, in fact, from the schooner's deck have seen her jib-boom end. I knew nothing of the collision of which I am to depose until the two vessels struck. I felt the jerk of the collision, and I thereupon flew on deck instantly." Gentlemen, I regret to find so startling a discrepancy between these two statements, because I can hardly think that the master of The Mellona, when he made his protest, could, through inadvertency, have mistaken whether he was keeping a good look-out or not. In selecting between these two statements, we must take his later statement as the true statement, and, accord-

ing to that statement, it is obvious that he was not on deck, but below, and consequently only one man was on the look-out at and immediately prior to the time when the collision occurred. It will be for you, gentlemen, as nautical men, to advise me whether, considering the state of the night, and the proximity of other vessels, such a look-out was a sufficient and proper look-out. In my own humble judgment, all the circumstances deposed to by the master and crew of The Mellona with respect to the state of the weather and character \* of the night, rendered it more peculiarly incumbent upon the master to have kept a better look-out. It is no excuse to urge that from the intensity of the darkness, no vigilance, however great, could have enabled The Mellona to have descried The George in time to avoid the collision. In proportion the greatness of the necessity, the greater ought to have been the care and vigilance employed; and I cannot but think that, under all the circumstances of the case, if the master of The Mellona found it necessary to go below for the purpose of consulting his chart, he was bound to have called up another of the crew to supply his place on deck.

Assuming, then, for the moment, that this collision was not the result of inevitable accident, but was occasioned by the misconduct of The Mellona, I must now offer a few observations upon the second question to be decided, namely, whether the subsequent loss of The George was the consequence of the collision, or whether it is to be attributed to the mismanagement and want of skill of her master. *Primâ facie*, gentlemen, the presumption of law is, that the vessel was lost in consequence of the collision. In all questions of this description, this is the *primâ facie* presumption; and great, indeed, would be the inconvenience, and still greater the difficulty, if, in all cases of this kind, where the vessel did not go down immediately, but was subsequently lost, the court had to enter into an investigation whether all the measures adopted on board the damaged ship were right, or whether, if other measures had been pursued, the vessel might not have been saved.

Such being the presumption of law, is there any thing in the facts which are in evidence before the court, that should rebut this presumption, and lead us \* to the conclusion that the [ \*.14 ] eventual loss of this vessel, and of the three lives which were involved therein, was occasioned by any want of skill or misconduct on the part of the master or crew of The George? What, according to the evidence of the witness, Legg, was the course subsequently pursued by the master of The George? In the first article of his deposition in chief, he says: "After some time, the mate called me forward in the brig, and, with my assistance, he cleared the broken

jib-boom of the schooner from our rigging, and the two vessels went clear of each other. By the collision, the larboard bulwarks of The George, and several of her stanchions, were carried away ; there were great holes where her stanchions had been, and her covering head was knocked up ; and her yards, rigging, and sails were all greatly injured, her braces, stays, and halyards being broken in all directions." He then proceeds to state, in his deposition on the third article, as follows :— "After The George had separated from The Mellona, we set her sails in the best manner we could, but every thing was so broken that we could not make much of a job of it. We tried to get into Yarmouth Roads. We were obliged to go somewhere, as the wind was dead on shore. The brig did not miss stays ; we did not try to tack at all. We could not have gone upon the starboard tack without danger of sinking the brig, through the holes in her larboard side ; we therefore did our best for Yarmouth Roads ; it was dark and thick, and we could not see any thing. There was sand on each side of us. We could not tell whether we were too far to leeward or too far to windward. We proceeded in uncertainty till it was a little after two o'clock in the morning, as well as we could guess, of the 5th of March ; we then struck the sand, and [ \* 15 ] \* the brig began hammering and knocking about on the sand." Such is the evidence of this witness upon the libel originally given in. In his deposition in chief on the second article of the responsive allegation, he further swears in these words :— "The said brig George sustained so much damage, and was so disabled for sea by the said collision, that, in my opinion, it would have been impossible for us to have hove to and waited for daylight. She was damaged on the larboard side ; and by our putting her on the starboard tack her wounded side would have been more under water, and we could not heave her to on the larboard tack without danger of being driven ashore ; indeed, we could not well have hove her to at all, her main topsail yard being broke right in two. Her halyards and braces, and main stay, and jib stay, and fore topmast backstay, and (on her larboard side) her bulwarks, stanchions, and covering heads were all broken ; every thing was flying about and useless ; and we could not, in my opinion, have kept her to windward without losing the ship and all hands. As she ran before the wind, one hand was sufficient to keep the pump in her sucking." It is true that this is the evidence of one witness, but it is to be remarked that the presumption is in favor of the master of The George ; that he acted properly to preserve his own life and the lives of his crew, and not that he was guilty of misconduct, negligence, or want of skill. It remains with you, gentlemen, to determine, looking at this evidence,

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whether he was ignorant of his duties, and wilfully attempted to make for Yarmouth Roads when he ought to have hove to.

Gentlemen, I shall now put to you three questions. The first is, Whether, under the circumstances of this \* case, the [ \* 16 ] master of The Mellona ought to have left the deck with only two seamen to keep the watch, or not?

2dly, Whether, if an additional look-out had been kept, there was a possibility that the collision might have been avoided?

3dly, Whether there is sufficient evidence to justify the conclusion that the subsequent loss of The George was attributable to any want of skill or misconduct on the part of the master or crew?

*Trinity Masters.* We are of opinion, 1st, That there was not a sufficiently good look-out on board The Mellona.

2dly, That, had there been a more efficient look-out, the collision might have been avoided.

3dly, That no blame whatever was attributable to the master and crew of The George, and that the subsequent loss of that vessel was not the consequence of any default on their part.

PER CURIAM. Then I pronounce for the damage.

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### THE MELLONA, Beale.<sup>1</sup>

March 15, 1848.

Where, in a cause of collision, bail is given and accepted between the party charged with the damage and the party promoting the suit, the promoter of the suit, if he succeeds in his action, is not precluded from subsequently disputing, before the registrar and merchants, the real value of the ship and freight.<sup>2</sup>

[The ship having changed owners, the freight not ordered to be brought in.]

[Agreement between proctors, as to the rule of decision, not sustained.]<sup>3</sup>

THIS was also a question in the same case, in the nature of an objection to the report of the registrar and merchants.

The court having pronounced for the damage, and directed a reference to the registrar and merchants, the proctor for the owner of The

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<sup>1</sup> [S. C. 6 Notes of Cases, 62.]

<sup>2</sup> [The Richmond, 3 Hagg. Ad. R. 431; The Mary Caroline, 3 W. Rob. 105. Otherwise, in cases of capture and salvage, The Betsey, 5 C. Rob. 295.]

<sup>3</sup> [The Saracen, 2 W. Rob. 461.]

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The Mellona. 3 W. Rob.

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George attended in the registry, and, for the first time, raised a question respecting the actual value of The Mellona, which was [ \* 17 ] \*not mooted in the original cause. The proctor for the owners of The Mellona declined to attend the reference, alleging that, in the original proceedings, the value of The Mellona had been sworn and admitted to be 540*l.*, and no more, and that bail had been given and accepted by the owners of the respective vessels, in that amount; that the owners of The Mellona were willing to pay in full to that amount, together with 100*l.* as the costs of the original action, and that the present reference was altogether unnecessary. The registrar and merchants, in the absence of the proctor for The Mellona, made up their report, and reported the amount of damage due to the owners of The George at the sum of 766*l.*, together with interest at the rate of five per cent.

On the default day after Michaelmas term, the 29th of December, the proctor for The George porrected his bill of costs, and the registrar reported the same at the sum of 233*l.* 19*s.* 11*d.*, present, the proctor for The Mellona, who objected to the taxation thereof.

A monition was then prayed against the owners of The Mellona and the bail, for payment of the damages and costs as reported, the proctor for the The Mellona objecting thereto, and praying to be heard on his petition.

The question was directed to stand over, and the proctor for The Mellona was assigned to bring in his act on petition in objection to the said taxation and monition.

The act on petition in substance set forth, "That on the 27th of April, 1846, an appearance to the original action was given by the then owners, and bail was accepted by the proctor for the owners of The George, in the sum of 640*l.*, to answer the said action; [ \* 18 ] namely, 540*l.* as for the value of the ship, and \*100*l.* to answer costs; that on the 14th of July, 1847, the cause came on for hearing, and the Trinity Masters being of opinion that The Mellona was to blame, the judge pronounced for the damages, and directed the usual reference to the registrar and merchants; that on the 4th of August following, a correspondence commenced between the respective proctors upon the subject of the damage, and was continued till the 29th of September, when the proctor for The George attended before the registrar, and for the first time disputed the value of The Mellona; that the amount of loss sustained by The George was unnecessarily submitted to the registrar and merchants, who have reported the same to be 766*l.* 6*s.*, together with interest at the rate of five per cent., and that such report has been brought in and confirmed. Wherefore, referring to the proceedings in the cause, and to what he

has herein alleged, the judge was prayed to pronounce the sum of 540*l.* only to be due from his said parties for damage, and to disallow all the sums charged and allowed by the registrar in the bill of costs on behalf of the adverse party, occasioned by the reference to the registrar and merchants, and to condemn her in the costs of this petition.

The answer to the act on petition, on behalf of the owners of The George, admitted that bail was originally given in the sum of 640*l.*, but denied that the value of The Mellona was only 540*l.*, and that the same was ever admitted by the proctor for The George. On the contrary, it alleged the said ship to have been at least of the value of 800*l.*; that although, at an interview between the respective proctors, it was intimated by the proctor for The George, that, provided the sum of 540*l.* were instantly paid, \*together with [ \* 19 ] the whole of the taxed costs, such sum would be accepted as a compromise; such offer was expressly intended, and so stated at the time, to be without prejudice to the interest and just claim of the owner of The George; that the said sum was not paid, or ready to be paid, as stipulated, and that, in consequence thereof, the compromise was eventually broken off; that the loss sustained by the owners of The George was necessarily, and according to law and the practice of merchants, submitted to the registrar and merchants, and that the costs of such reference are justly chargeable upon the owners of The Mellona; that up to that time the owners of that vessel had brought in no account of freight, although it appeared, from the proofs in the cause, that The Mellona was laden at the time when the collision occurred. The answer then concluded with a prayer that the court would reject the act on petition; would tax the bill of costs porrected by the proctor for The George at the sum reported by the registrar; would condemn the owners of The Mellona in the costs of the petition; and would decree a monition against them, to pay in the amount of freight due to them on the said voyage, &c., &c."

The question now came on for hearing, and was argued on behalf of the owners of The Mellona by *Addams* and *Robinson*.

*Queen's Advocate* and *Bayford*, *contra*.

#### JUDGMENT.

DR. LUSHINGTON. Five points of more or less importance have been raised in the discussion of this case. The first point is, whether the value of the vessel is to be \*considered as con- [ \* 20 ] clusively fixed in the amount to which bail has been given and accepted. Secondly, what is the actual value of the vessel,



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according to the evidence now produced, provided I should be of opinion that the question as to the value is still open to consideration. Thirdly, on whom should fall the costs of the reference to the registrar and merchants. Fourthly, whether any proceedings can now be taken to make the freight liable. Fifthly and lastly, whether the compromise or agreement which is alleged to have been made between the respective proctors in the cause, is binding upon the court as to the judgment which it is now called upon to pronounce. If I were to consult my own inclination, I should take time to consider the form in which I should frame this judgment. Having, however, made up my mind upon each of the points which have been raised, I feel that it will be for the benefit of the parties in the suit that I should deliver my opinion at once, instead of subjecting them to the delay which must ensue if I reserve my judgment, as the court will not sit again until the next term.

Now I apprehend that, originally, whatever may have been the practice in later days, the main object in arresting a vessel in a cause of damage was to secure an appearance on the part of the owners of such vessel to answer for any damage done to the vessel proceeding in the cause. By the ancient law, as it stood prior to the passing of the statute, the owners of the vessel doing the damage were liable to the full amount of the damage done, without reference to the value of the ship; and not only might proceedings have been taken against them to the fullest extent in the courts of common law, but if the

owners had been proceeded against personally in this court, [ \* 21 ] \* there can, I conceive, be no doubt that, in case of a conviction, a similar decision would have followed. Whether or not at that period it would have been competent to proceed against the ship in this court, and afterwards ingraft upon those proceedings a further responsibility against the owners, as was done by Sir John Nicholl in the case of *The Triune*,<sup>1</sup> it is unnecessary to consider in the present instance, as the act of parliament has limited the responsibility of the owners, and by the law, as it now stands they are only responsible to the value of the vessel and its appurtenances, together with the freight and the costs which may have been incurred.

Such being the law as it now exists with respect to the liability of ship-owners, it is, I apprehend, perfectly clear, that as regards the vessel arrested in this case, the process of this court may be enforced against the owners to the full extent of the ship and its appurtenances, and this without reference to any question that may be raised

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<sup>1</sup> [3 Hagg. Ad. R. 114.]

whether the owners of the vessel, at the time of the arrest, were or were not the owners when the damage was committed. Whether the process of the court can be enforced against the freight in a case of change of owners at the time of the arrest is a question which I shall presently have to consider.

I will now refer to the proceedings which have been had in this case, and I think it is desirable that I should state them somewhat *in extenso* before I deliver my opinion as to what I apprehend to be the effect of them. The minutes of the proceedings commence by reciting the nature of the action, and, after setting forth that it was brought by Samuel Pring, of Newport, in the Isle of Wight, the sole owner of the brig George, and of the cargo \*laden [ \*22 ] therein, against The Mellona and her freight, and against certain parties intervening, an entry is inserted in these words: "E. Toller appeared to the action for Frederick Thomas Falla, Abraham Ozier, and Peter Ozann Falla, all of the island of Guernsey, ship-owners, and produced as sureties, Henry Terry, of No. 31, Botolph Lane, in the City of London, ship-agent, and William Stiles, of No. 2, Edward street, Kingsland Road, in the county of Middlesex, stone merchant, who, submitting themselves to the jurisdiction of the court, gave the usual bail for E. Toller's said parties in the sum of 640*l.* unto S. P., the sole owner of the late brig George, and to answer the action commenced on his behalf. Present, Coote, who accepted such bail to answer the action." Now, in my judgment, the effect of this entry in the minutes, as regards the bail, clearly limits their responsibility to the sum of 640*l.*; at the same time I am of opinion that, upon general principles, without reference to the proceedings in this particular case, the owners of a vessel doing the damage would be responsible to the full value of the ship and freight, whether it be more or less than the amount of bail which may have been offered and accepted. In this opinion, I am borne out by the decision of Sir J. Nicholl in the case of The Richmond, which has been cited in the course of the argument, and has been much pressed upon the court by the counsel for The George.

Having arrived at this conclusion, I have now to consider what, under the circumstances of the case, is the real value of the vessel, and how that value is to be determined. The ordinary modes by which, in questions of this kind, the value of the ship and freight may be ascertained, are twofold. The first is by appraisal, in which case the return of the \*commission being a [ \*23 ] proceeding of the court, the appraised value, unless objected to, binds both parties. A second mode is by agreement, in which case both parties are bound by their own act and consent. In the

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present case, it is clear that the vessel has not been appraised, neither is it suggested that any direct agreement was entered into between the parties in the suit. It is said, however, that, in consequence of what took place with respect to the bail, a tacit agreement is to be assumed, and that the owner of the vessel which has been run down is bound by that agreement as to the value of the vessel which has done the damage. I have consulted the registrar of the court upon this point, and, according to the information which I have received from him, I am bound to hold that there is no such binding agreement in this case, and that it was open to the promoter of the suit to question the value of the ship either before the registrar or in this court, after the sentence of the court had been pronounced in his favor. Such, I am informed, is the practice pursued in the registry, and I should not be disposed to depart from this practice unless there were very strong reasons in law which required me to do so. What then is the evidence before the court with respect to the value of the ship? The evidence before me (for I do not think it is for the interest of the parties that I should refer the case back again to the registrar and merchants to consider the value of the vessel in 1845) consists of three affidavits. The first and most important of these is the affidavit of Mr. West and Mr. Ashton. I see no reason to suspect the fairness and candor of this affidavit; and both these deponents most positively swear, that on the 24th of April, 1846, they went [ \* 24 ] on board The Mellona, and \* carefully surveyed the vessel, with all her equipments, with a view to ascertain the value thereof; and that the utmost value of the said vessel, with all her equipments, is, in their judgment and belief, 540*l.*, and no more. The opinion of these witnesses is confirmed by the further affidavit of Mr. Terry, who states, "that he is well acquainted with the value of ships, and that he inspected the said vessel, Mellona, at or about the time bail was given on behalf of the owners, and that the utmost value at such time was as he verily believes 540*l.*, and which he verily believes is her full value at the present time." In opposition to these affidavits, one single affidavit is brought in on the other side, namely, the affidavit of Mr. Machon, a ship-builder at Guernsey, who states that he knew and was well acquainted with the schooner Mellona, and, in the month of March, 1845, or thereabouts, he believes that the value of the said vessel was from 750*l.* to 800*l.* sterling. Such being the state of the evidence as to the value of the ship, it is perfectly clear that the balance preponderates in favor of the owners of The Mellona, and the court can pronounce no other judgment than that the value of the ship amounted to 540*l.* and no more. How does this conclusion affect the question of costs?

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The result of it appears to me to be this ; that the proctor for The Mellona, in declining to appear before the registrar and merchants upon the assumption that the value was conclusively fixed by the amount of bail, did not pursue that course which, in my opinion, he ought to have adopted. It was competent for him to have alleged before the registrar and merchants that the value of the ship did not exceed the amount of the bail, and he ought to have done so.

Instead of that, he refused to go before the registrar \* and mer- [ \* 25 ] chants, and now objects to the reference. I do not mean to attach the slightest degree of blame to the proctor for The Mellona. I have no doubt but he acted with the very best intentions for the interest of his clients ; at the same time I cannot but think, that, as regards the costs of the reference itself, his declining to appear does not entitle his parties to be absolved from the payment of those costs. Two points only now remain to be considered. The first of these, the question how far any compromise alleged to have been made between the proctors in the cause is binding upon the court, I may dismiss at once with the observation, that I think it would be highly inconvenient if the court was to take notice of any negotiations of this kind between one proctor and another. I have already expressed my sentiments upon the matter in the judgment which I delivered in the case of The Saracen,<sup>1</sup> and, without repeating the observations I made in that case, I will only add, that I see no reason whatever for departing from those sentiments upon the present occasion. I now come to the last consideration, namely, how far I have authority and jurisdiction to make the freight liable under the peculiar circumstances of the case. It is, undoubtedly, a matter of every-day practice to require the owners of a vessel which has committed damage to bring in the amount of the freight which she has earned in the course of the voyage in which she was engaged at the time the damage was done. It is not difficult to understand the principle upon which this is required, namely, that the owners are responsible to the value for the property which is in their possession. It is, however, a very difficult thing, when the vessel has changed owners between the cause of action and the arrest, to make the person to whom the property in \* the ship has passed responsible, beyond the [ \* 26 ] value of the ship, for the amount of freight which the former owner may have received, and may have gone with it to a distant part of the world. I should, in such a case, be at all times very cautious in exercising the authority of this court to enforce

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<sup>1</sup> [2 W. Rob. 461.]

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The Christina. 3 W. Rob.

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the bringing in of the freight. It is said, in the present instance, that there has been no substantial change of owners, and that two of the original owners still retain the ownership. That is a point which I must confess is not satisfactorily established by the evidence which is before me. Looking to the evidence, I am bound to assume that there has been a change of ownership, and if so, I am not disposed, under the circumstances, to take upon myself to enforce the liability of the freight. I have now considered all the points which have been mooted, and what is the result? With respect to the bail, I have decided in favor of the owner of The George, that it was open to them before the registrar and merchants to dispute the value of the ship, notwithstanding the amount in which bail had previously been given and accepted. Upon the second point I have decided in favor of the owners of The Mellona, that according to the evidence before the court the true value of the vessel must be taken at 540*l.*, and no more; upon the third and fifth points I have decided against The Mellona, and in favor of The George; and upon the fourth point, in favor of The Mellona, and against The George. It appears to me that all I can do is to order the 540*l.* to be paid, together with the whole costs of the original reference, and to make no order as to costs with respect to the present proceedings.

[ \* 27 ]

\* THE CHRISTINA.<sup>1</sup>

January 13, 1848.

Steam-tugs employed in an ordinary service of towing merchant vessels are bound to be subservient to the orders of the pilot on board the vessel in tow. The master of the tug must implicitly obey the orders of such pilot, excepting in the case of wilful misconduct or gross mismanagement on the part of the pilot. The master of a steam-tug employed in towing a vessel from Gravesend to the Surrey Docks, having brought the vessel in tow into a collision by disobedience of the pilot's orders, court pronounced against the owner's claim for towage remuneration.

● THIS was a claim for towage, brought by the owners of the steam-tug, The Lass of Gowrie, for towing this vessel from Gravesend to the Surrey Canal Dock.

The act on petition on behalf of the owners of the steam-tug in substance pleaded, that on the morning of the 31st of August, whilst

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<sup>1</sup> [S. C. 6 Notes of Cases, 4; affirmed on appeal, 6 Moore, P. C. R. 371.]

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The Christina. 3 W. Rob.

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the said tug was in the lower part of the Sea Reach, a verbal agreement was made between the master of The Christina and the master of the steam-tug, that The Christina should be towed by the latter up to London for the sum of 8*l*. That a rope was thereupon made fast from The Christina to the steam-tug, and the two vessels proceeded together towards London, and upon reaching Gravesend The Christina was boarded and taken in charge by a duly licensed pilot. That at 6, P. M., The Christina was brought to anchor off Woolwich, and at 3, A. M., of the following day was again got under weigh by the direction of the pilot, and was towed by the steamer to the entrance of the Surrey Dock Canal, where she arrived about 5, A. M. That the steam-tug then left The Christina, and the owners have since made repeated applications for the payment of the 8*l*. but without success.

On behalf of the owners of The Christina it was set forth in the answer to the act on petition, "that The Christina having engaged the steam-tug to tow her into dock in a careful and skilful manner, was taken in tow by her in the Lower Sea Reach on the 31st of August, and about 4, P. M., of the following day was proceeding up the river in Limehouse Reach, when a brig was perceived ahead, with her sails set, but \* apparently having her anchor [ \* 28 ] down, for the purpose of drudging thereby into a tier of vessels in Limehouse Reach. That the pilot, conceiving that there would not be sufficient room for The Christina to pass to the eastward of the brig in consequence of the vessels which were there stationed, immediately called out loudly and repeatedly to the steamer to tow to the westward, at the same time ordering the helm of The Christina to be put hard a-starboard, which was done. That the master of the steam-tug, instead of obeying the pilot's orders, and passing to the westward, continued his course to the eastward, and suddenly putting his helm a-starboard, the steam-tug was brought right on the larboard bow of the bark. That the pilot thereupon repeatedly called to the master of the steam-tug to go on, but when The Christina was within a cable's length of the brig, the steam-tug cast off the tow-rope, and The Christina was drifted by the flood-tide, which was then running strong, and the two vessels came into collision, causing to both vessels considerable injury. That no such collision would have occurred if the steamer had obeyed the orders of the pilot in the first instance, or had not cast off the tow-rope; and that the accident was occasioned solely by the misconduct of the steam-tug. That the owners of the bark having sustained a heavy expense in repairing the brig as well as their own vessel, were justified in retaining the 8*l*. by way of a set-off.



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The case was argued by *Addams* and *Twiss* for the steam-tug.

*Queen's Advocate* and *Jenner*, *contra*.

[ \* 29 ]      \* JUDGMENT.

DR. LUSHINGTON. The action in this case is brought by the owners of a steam-tug, alleging that, in pursuance of a contract with the owners of the vessel proceeded against, they duly fulfilled that contract in towing her from Gravesend to the Surrey Canal Dock. This averment is denied by the owners of *The Christina*; and it is alleged in their behalf that a collision with a brig called *The Mary Clark* was occasioned by the misconduct of the persons on board the steam-tug, and that the owners of the bark having incurred heavy expenses in repairing the brig as well as their own vessel, were entitled to keep back the 8*l.* claimed by the steam-tug by way of a set-off. The true question, I conceive, which I have to determine is, not where there is any thing in this case in the nature of a set-off, but whether the owners of the steam-tug have fulfilled the contract which they allege themselves to have entered into with the owners of the vessel proceeded against. In a former decision I have had occasion to observe, that in all ordinary cases of this kind, I consider it to be a part of the contract itself, that the steam-tug should be subservient to the pilot on board the vessel in tow, and that it is the duty of the persons on board the steam-tug implicitly to obey and carry out his orders. I am speaking now of a steam-tug in the performance of an ordinary towage service. There may, indeed, be cases in which this duty ought to be relaxed, and where the rule could not possibly be applied, as, for example, in cases of salvage, where the master of the steam-tug is called in to remedy the errors or misfortunes of the pilot, or where

he sees a pilot acting in such a manner as to threaten the  
 [ \* 30 ] certain destruction of his own vessel, and \* to endanger the lives and property of others. In such cases the master of the steam-tug would unquestionably be justified in exercising his own discretion, and in acting upon his own knowledge, independently of the pilot. But these cases, it is to be observed, form the exceptions to a general rule, and where such exceptions are alleged, they must be proved by the fullest and most satisfactory evidence. In delivering my judgment in the case of *The Duke of Sussex*, I expressed my strong opinion upon the necessity of adhering rigidly to this rule, and I see no reason to depart from that opinion in the present instance. Let me then now shortly refer to the facts and circumstances of the present case as they are disclosed in the proceedings before the court.

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The pilot, it appears, was taken on board at Gravesend at 1, P. M., of the 31st of August, and at 6, P. M., in consequence of the tide falling, the bark was by his direction brought to anchor off Woolwich. At 1, P. M., of the following morning, the vessel was again got under weigh; and it is averred on behalf of the steam-tug, by way of disparagement to the pilot, that in ordering the vessel to be got under weigh at so early an hour, he was guilty of a violation of the Trinity House regulations. Whether the fact be so or not is not in my opinion a matter of the slightest importance, nor can it in any degree affect the ultimate decision of the case. The vessels proceed (The Christina being in tow of the steam-tug) until they arrive at Limehouse Reach, when the steam-tug endeavored to pass to the eastward of The Mary Clark, which was at such time drudging or sheering by her anchor into a tier of vessels in Limehouse Reach. Upon observing the steam-tug endeavoring to pursue this course, the pilot (whether right or wrong it is unnecessary now \* to con- [ \* 31 ] sider) determined to take a course to the westward, and accordingly gave orders to the master of the steam-tug to starboard his helm and go to the westward. It is not denied that the steam-tug in the first instance prepared to pursue her course to the eastward as stated. The first question then is, whether, upon receiving directions from the pilot to take a contrary course, the master of the steam-tug obeyed these directions, and whether he obeyed them as soon as he could do so after the order was given. The evidence upon both of these points is exceedingly conflicting. On the part of The Christina, it is sworn by several of the witnesses that the order was loudly and repeatedly given, but was disregarded by the persons on board the steam-tug. On the other hand, it is sworn by the crew of the steamer that the order was only once given, and was promptly and immediately obeyed. I should, I confess, entertain some doubt (if it were necessary to decide the point,) whether the order was obeyed or not. Assuming, however, that it was obeyed, I have no hesitation in concluding that it was not obeyed with that promptitude and alacrity which ought to have been shown by the crew of The Lass of Gowrie. What follows? According to the statement of the tug, she starboards her helm, and proceeds to the westward as directed, and when about ten fathoms from the brig, the master, without any orders of the pilot, casts off the tow-rope, loudly hailing the bark to go to the eastward. It is alleged that this was done under the pressure of an urgent necessity, in consequence of the master seeing that the bark could not pass to westward of the brig, owing to the flood-tide running very strong. Is this necessity established on behalf of the owners of the steamer by the evidence in the cause?

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[ \* 32 ] I am clearly \* of opinion that it is not. If the orders of the pilot had been obeyed, there would, in my judgment, have been ample space for the bark to have passed to the westward; and I further think, that in casting off the tow-rope the master of the steamer was as much guilty of a disobedience of orders as if he had refused to go to the westward at all. But it has been argued on behalf of the steam-tug, that the pilot was altogether to blame in ordering the course of the vessel to the westward and not to the eastward of The Mary. I have already stated that in my judgment there is not any evidence to satisfy me that The Christina might not have gone to the westward as well as the steamer. Assuming, however, that the eastward was the more proper course, I have yet to learn, that unless certain risk were likely to arise from going to the westward, the persons on board the steam-tug had a right to exercise any discretion at all and overrule the order of the pilot. In the affidavit of Mr. Fisher, the harbor master; which has been so much relied on by the counsel for the steamer, it is not even suggested that any danger would have accrued if the course proposed by the pilot had been carried into effect. He merely states, generally, that the order of the pilot to take his vessel to the westward was an improper order, and that the steam-tug, under the circumstances of the case, was perfectly justified in casting off The Christina as she did in order to prevent her from running into The Mary Clark. Whether the steam-tug was justified in so doing is a question for this court to determine, with all the circumstances of the case before it, and with a knowledge of the law which is to be applied to them. In venturing his opinion upon the subject from a mere perusal of the evidence in the cause,

[ \* 33 ] Mr. Fisher has, I \* think, somewhat gone out of his own peculiar department; and whatever deference I might otherwise be disposed to pay to his experience when brought to bear in a proper and fitting form, I am bound to receive his testimony upon the present occasion with the greatest doubt and hesitation. Upon the whole view of the case, then, I must pronounce against the claim which is set up by the owners of the steam-tug. I am well aware that mischiefs may in some instances arise from pilots having the entire control over steam-tugs, and giving directions contrary to the judgment and experience of the masters of steam-tugs, conversant as they are with every part of the waters in which they are employed, at the same time I feel that still greater difficulties would be occasioned by two conflicting and independent authorities being exercised in the navigation of one and the same vessel. Under the circumstances of the case, therefore, I am of opinion, that although the pilot may

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The Debrechia. 3 W. Rob.

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not have exercised a sound discretion in the orders he gave, yet there is no sufficient justification of the master of the steam-tug in refusing to obey and carry those orders into effect. I must pronounce against the claim, and with costs.

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THE DEBRECSIA.<sup>1</sup> Hammond.

February 1, 1848.

An agreement between the master of a vessel and a mariner to proceed on a voyage to the Danube for the stipulated sum of 30*l.* held to be a special contract over which the Court of Admiralty has no jurisdiction.<sup>2</sup>

THIS was a question as to the admission of a summary petition in a suit for subtraction of wages.

The summary petition pleaded:—

That, in the month of October, 1847, the steam-ship, The Debrechia, being in the port of London, and designed on a voyage to Galatz on the Danube, G. H. \* the master, by himself or agent, hired and [ \* 34] shipped K. T. to serve as mate on board the said steam-ship during the then intended voyage, and agreed to pay him as wages for the said voyage the sum of thirty pounds. That on the 12th of the said month of October the said K. T. went on board, and entered into the service of the said ship in the capacity and at the amount of wages as aforesaid, and signed the usual ships' articles or mariners' contract. That on the 13th of the said month the engines of the said steam vessel were tried and found to be in working order; and bonded stores and provisions were taken on board, and the said K. T. was ordered (together with the rest of the crew) to be in readiness the next morning to proceed in the steamer on her then intended voyage. That the said K. T. accordingly, on the 14th of October, (together with the rest of the crew,) went on board the said steamer, and remained on board in the service thereof until the 4th day of November following, when he was discharged from the service of the said ship, which, instead of proceeding on the said intended voyage, remained in the port of London. That during all the time the said K. T. remained in the service of the said steam-ship he well and truly per-

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<sup>1</sup> [S. C. 6 Notes of Cases, 31.]

<sup>2</sup> [The Riby Grove, 2 W. Rob. 52.]

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The Debreesia. 3 W. Rob.

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formed his duty as mate on board thereof, and was obedient to the lawful commands of the master, and well deserved the wages schedulate, and that so much or greater wages were then given to persons serving in the like capacity on board ships of the like burden, and on the like voyages. That the said K. T. has made repeated applications to the master, as also to the agent of the owner of the said steamer, for the payment and satisfaction of the wages due to him for such his services without being able to obtain the same; [ \* 35 ] and the said K. T. is \* also entitled, as schedulate under the statute of the 7 & 8 Vict. c. 112, s. 11, in addition to his said wages, to the amount of two days' pay for each day, not exceeding ten days, during which payment thereof, without sufficient cause, has been delayed beyond the 11th day of November last, the period at which the said wages ought to have been paid.

The admission of this summary petition was opposed on behalf of the owners of The Debreesia by *Jenner*, who submitted —

That the principle of law by which the question must be decided had already been laid down by the court in the case of *The City of London*, (1 Rob. jun. p. 88.)

That the *dictum* laid down in that case was, that where the voyage was abandoned for which the seaman had been engaged, no suit for wages would lie in the Court of Admiralty, because in such a case there would be nothing to show the real amount of loss sustained. That in the present case the intended voyage had been altogether abandoned, a circumstance which not only distinguished the case from the case of *The City of London*, but which rendered the *dictum* more peculiarly applicable in the present instance.

That another objection existed against the admission of the summary petition in the form and terms in which the alleged hiring was drawn up. The agreement, upon the face of it, showed that it was a hiring not in the usual form, but a hiring for a specific sum, converting the transaction into a special contract, over which the court had no jurisdiction.

*Addams, contra.*

[ \* 36 ] That the *dictum* in the case of *The City of London* \* was not applicable to the circumstances of the present case, because the loss which the seaman had sustained was specifically and distinctly alleged in the summary petition, namely, the sum of 30*l.*, which the master of the vessel had contracted to pay him; that the agreement being made in this stipulated sum, the claim of the mariner might be regarded as a claim for liquidated damages, and in that light the court would clearly possess a jurisdiction to entertain the

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The Debrechia. 3 W. Rob.

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question; that no tender of any description had been made to the mariner, and he was therefore compelled to resort to the protection of the court, and it would be a great hardship to him if he should be driven to the more expensive and slower process of a court of law to enforce so small a claim, instead of having the benefit of the more summary jurisdiction of this court.

JUDGMENT.

The question in this case is strictly a question of law, whether I have the power and jurisdiction to entertain the complaint of the mariner as it is set forth in this act on petition. The agreement between the master and the party suing, purports to have been made in pursuance of the statute 6 Victoria, and by the terms of that agreement the mariner, amongst other things, contracts to serve on board the vessel on a voyage to Galatz on the Danube, there to be discharged and to find a passage for himself home, without any expense to the owners of the vessel, 30*l.* being stipulated as the amount of wages for such voyage. The act on petition, after stating the agreement to this effect, then further alleges, that on the 11th October, the mariner went on board in the character of [ \* 37 ] mate, and on the 4th of November he was discharged by the master. That he has made frequent applications for his wages without effect. And that under the statute 7 & 8 Vict. c. 112, s. 11, he is entitled, in addition to his wages, to two days' pay for each day, not exceeding ten days, during which payment thereof, without sufficient cause, has been delayed. The question, as I have stated, is, whether such being the terms of the agreement, I have the jurisdiction to entertain the mariner's complaint. I have carefully examined and considered the case of *The City of London*,<sup>1</sup> which has been cited in the argument, and also the case of *Wells v. Osman*,<sup>2</sup> which is referred to by Lord Tenterden in his treatise on shipping, and I do not think that either of those cases meets the circumstances of the present case. The case decided in the Court of King's Bench merely determines that where a seaman is engaged under an ordinary contract for a specific voyage, and, after assisting on board in rigging and fitting out the ship or otherwise, the voyage is abandoned, and the seaman is discharged, the total abandonment of the intended voyage on the part of the owners will not preclude the Court of Admiralty from entering into the consideration of the recompense to which the seaman is entitled during the period he was so engaged. In the case of

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<sup>1</sup> [1 W. Rob. 88.]

<sup>2</sup> [2 Ld. Raym. 1044.]



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Seringapatam. 3 W. Rob.

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The City of London, I myself, holding the same doctrine, was of opinion that my jurisdiction was not taken away; but in neither of these cases did the difficulty arise which forms the real ground of objection in the present case. In the present instance the right of the mariner to sue is denied not only upon the ground that there has been an abandonment of the voyage for which he was engaged, but that his agreement with the owners was in the [ \* 38 ] \* nature of a special contract. This, I apprehend, as far as this court is concerned, is a fatal objection. I cannot find any authority that would authorize me to interfere, neither do I see in what way I could proceed to determine what is the amount of the indemnification to which the mariner is entitled for a breach of the contract. The matter in issue, it appears to me, lies entirely and exclusively within the province of a jury, whose functions I should usurp in adjudicating upon it. I must, therefore, reject this summary petition.

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SERINGAPATAM.<sup>1</sup>

*Motion.*

April 28, 1848.

The owners of a foreign vessel, which was run down by a British ship, brought an action for damages in the admiralty court, and a cross-action was also entered against the foreigners by the British owners. The foreign owners being resident abroad, and declining to give an appearance in the cross-action, the cross-action was discontinued, and the cause was heard upon the original action alone.

The Trinity Masters being of opinion that both vessels were in fault, the court decreed the damage to be equally divided between them.

This sentence was appealed and affirmed by the privy council, and the cause was remitted.

A motion was now made on behalf of the British owners that the registrar and merchants should be directed to ascertain the amount of the damage sustained by the British ship, and deduct a moiety of that damage from the compensation awarded to the foreign owners. The court rejected the motion, but withheld the payment of the sum claimed by the foreign owner until he consented to a deduction of a moiety of the damage sustained by the British ship.

THIS was a cause of collision promoted against this vessel by the owners, master, and crew, and the consignees of the cargo laden on board the Danish barque *The Harriet*.

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<sup>1</sup> [S. C. 6 Notes of Cases, 165.]

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Seringapatam. 3 W. Rob.

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The case was argued upon the merits before Trinity Masters upon the 27th, November, 1847, (vide vol. 2, p. 506,) and the Trinity Masters being of opinion that both vessels were to blame, the court pronounced that the damage should be equally borne by both parties. This sentence was appealed to the Judicial Committee of the Privy Council by the owners of The Seringapatam, and the sentence of the court below was affirmed and the cause remitted.

A motion was now made on behalf of the owners of The Seringapatam praying that the court, in estimating the amount of compensation due to the owners of The Harriet, would direct the registrar and merchants to ascertain and deduct therefrom a moiety \* of the damage sustained by The Seringapatam. The [ \* 39 ] motion was opposed on behalf of the owners of The Harriet by

The *Queen's Advocate* and *Robinson*, who submitted that, at the time of the decision, both in this court and in the Privy Council, no question was mooted with respect to the damage sustained by The Seringapatam. The owners of that vessel were merely defendants, and no prayer for compensation was made on their behalf; that although, in the earlier stages of the proceedings in this court, a cross-action had been entered by the owners of The Seringapatam, such cross-action was subsequently abandoned, upon the rejection of their motion to stay the proceedings until the owners of The Harriet should give bail to answer that action. The only question, therefore, before this court and the Privy Council, was, what was the amount of compensation which the owners of The Harriet were entitled to receive? The sentence of this court, as entered by the registrar, was in these words:—“ The judge, by interlocutory decree, pronounced that the collision was occasioned by the default of the master and the crew of The Harriet, and the officers and crew of The Seringapatam, and that the damage arising therefrom ought to be borne equally by the owners of both vessels; and the court then proceeded to pronounce ‘for a moiety only of the damage proceeded for in this cause,’ and condemned the owners of The Seringapatam, and the bail given in their behalf, in the said moiety of the said damages.” That the Court of Appeal, by its decision, has in effect, though not in express terms, said that the owners of The Harriet shall receive a clear moiety of the damage which \* they have sus- [ \* 40 ] tained. The judicial committee having thus affirmed the original sentence, and remitted the cause, the original decree of this court has become the decree of the superior Court of Appeal. The case therefore comes back with a final sentence of the Court of

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Appeal stamped upon it; and in entertaining the present motion the court would not only depart from its own original decree, but would, moreover, in point of fact, constitute itself a court of appeal over the judicial committee of the Privy Council, by undertaking to revise and modify their sentence.

In support of the motion, *Addams* and *Deane, contra*. That, although the cross-action on the part of The Seringapatam was not proceeded with, both the parties were before the court; and the true meaning of the original sentence was, that, as both parties were to blame, all the damage sustained by the collision was to be equally divided between them; that, in limiting the decree as suggested by the owners of The Harriet, the court would in effect throw upon the owner of the Seringapatam much more than a moiety of the damage, inasmuch that the owner of that vessel would not only have to pay 6,500*l.* claimed by The Harriet, but would have to bear in addition the whole amount of the expenses which they had incurred in repairing their own vessel; that such a result would not only be repugnant to all equity, but would be a direct departure from the tenor of the sentence itself.

*Per Curiam.*

The question in this case arises under somewhat peculiar [ \* 41 ] circumstances. Upon the 1st May, 1846, \* an action in the sum of 15,000*l.* was entered on behalf of the owners of The Harriet against The Seringapatam, and upon the 30th of May a cross-action was brought by the owners of The Seringapatam in the sum of 550*l.* An appearance was given in the action against The Seringapatam, on behalf of the owners of that vessel; and the owners of The Harriet being foreigners, and resident abroad, and no appearance being given on their behalf in the cross-action, a motion was made by the proctor for The Seringapatam, praying the court to stay the proceedings until the owners of The Harriet should give bail to answer the action brought against them. The court, having directed the matter to stand over for consideration, finally rejected the application, but directed the owners of The Harriet to give security for the costs of the original action.<sup>1</sup> In consequence of this

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<sup>1</sup> The motion to stay the proceedings was made by the proctor for The Seringapatam upon the 23d June, 1846, and was opposed by the proctor for The Harriet. Upon the 6th July following, the learned judge, having taken time to deliberate, disposed of the motion to the following effect: —

PER CURIAM.

In this case, an action was commenced by the owners of The Harriet against The

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Seringapatam. 3 W. Rob.

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\* decision, the owners of The Seringapatam discontinued [ \* 42 ] their proceedings as plaintiffs, and the cause was heard upon the original complaint of the owners of The Harriet, no admission being made on their part that the proceedings in the first case should govern, or in any manner affect, the subsequent action. When the case was heard, the Trinity Masters were of opinion that both the vessels were to blame, in which case, if the two actions had been going on according to the ordinary usage and practice in these cases, the sentence of the court would have attached to both vessels, and the court would have decreed a joint reference to the registrar \* and merchants, to ascertain the amount of the total [ \* 43 ] damage, and would have directed the said damage, together with the costs, to be equally divided between the respective owners. The cross-action, however, as then stated, having been abandoned, the court made its decree, pronouncing for a moiety of the damage done to The Harriet, and this decree has been affirmed upon appeal to the judicial committee of the Privy Council. Under this state of

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Seringapatam, to recover the damages sustained by them in the total loss of their vessel by a collision off Beachy Head, in the month of April last. A cross-action was subsequently entered on behalf of The Seringapatam; and the owners of The Harriet, who are foreigners and residing out of the jurisdiction of the court, have not given, and, as I understand, decline to give, an appearance to that action. Under this state of circumstances, the court has been moved, on behalf of the owners of The Seringapatam, to suspend the proceedings until bail shall be given by the owners of The Harriet to answer the action which is brought against them. As the application was somewhat unusual to the practice of the court, I took time to consider the matter, and having since bestowed much deliberation upon it, I regret that, with a strong predisposition to assist the owners of The Seringapatam, I am under the necessity of rejecting their prayer. The first difficulty which suggests itself in examining the question, is, that The Harriet has been sunk and totally lost; consequently, so far as the proceedings on the part of the owners of The Seringapatam are proceedings *in rem*, there is no subject-matter to proceed against. A still stronger difficulty presents itself if the proceedings in the cross-action are to be carried on as against the owners of The Harriet personally, inasmuch that, by the construction which has been put upon the statute by the Court of Exchequer, the ship having been lost, the whole property to be proceeded against has been extinguished, and beyond that property the owners could not be made responsible. It might, perhaps, be more consonant to the principles of equity, that, as one of the litigating parties has obtained a security in case he should succeed in his action, the same security ought to be exacted from him in favor of the other party in the suit. If I had any authority or jurisdiction to enforce such security, under the circumstances of the case, I would gladly exercise it in favor of the owners of The Seringapatam. Having, however, given the matter my best consideration, I cannot discover that I have any such jurisdiction. I must therefore reject the motion. At the same time, as the party suing is a foreigner, I shall, as a matter of course, require him to give security for the costs of his action.

Motion rejected.

circumstances, I am now asked to refer to the registrar and merchants the amount of damage sustained by The Seringapatam, for the purpose of ascertaining the whole amount of damage done to both vessels, and dividing the loss between them, according to the usual practice in questions of this description.

Two objections have been raised against this course of proceeding. First, That I am precluded by the sentence of the Privy Council from making any alteration in my original decree. Secondly, That the cross-action has not been prosecuted, and that no agreement has been made, on the part of the owners of The Harriet, that the two actions should depend upon the decision which has been pronounced. With respect to the first objection, if I considered for a single moment that the judicial committee, in affirming my sentence, intended to tie up my hands as suggested, it would be my duty, unquestionably, whatever the consequence might be, to submit to so high an authority. I do not, however, conceive that such is a correct interpretation of the effect of the judgment in the Court of Appeal. In remitting the cause, the learned judges of that court, I conceive, intended that I should carry into effect my own original decree, and certainly at the period I pronounced the decree, it was not my intention to [ \* 44 ] limit myself in dealing with the case. In \* respect, then, to my own original decree, and the affirmance of it by the judicial committee, I do not think that I should make an alteration or reversal of that decree, or be guilty of infringing upon the authority of the Privy Council, by doing any thing that might be accessory or in addition to it, so as to meet the real justice of the case, and the peculiar circumstances under which it comes before me. The second objection that has been raised presents, I must confess, a much greater difficulty, and I do not exactly see how I can deal with the second suit, which has been abandoned, as an existing suit, and say to the owners of The Seringapatam, you shall have the benefit of a decree which, in point of fact, has never been pronounced in their favor. The difficulty, it is true, is created by the peculiar circumstances of the case itself; and if I could have foreseen the result of the proceedings before the Trinity Masters, I would certainly have made some arrangements at the time to meet the circumstances of the case; for I never will be induced, unless compelled by law, to further the commission of an injustice towards either party upon a mere matter of form. Taking all the circumstances of the case into my consideration, the course which I shall adopt is this,— I shall not depart from my original decree, but shall confine the reference to the registrar and merchants to the amount of the compensation to which the owners of The Harriet are entitled. At the same time, I shall

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The Felicidade. 3 W. Rob.

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not permit the full amount of that compensation to be paid to them, unless they submit to the deduction of a moiety of the damages which has been sustained by the owners of The Seringapatam. By this decision, I conceive the owners of The Seringapatam will have no reason to complain that injustice has been done towards them.

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\* THE FELICIDADE, otherwise VIRGINIA.<sup>1</sup> [ \* 45 ]

April 28, 1848.

The principles of law which are applied to prize captures in time of war are applicable to questions of bounty for the capture of vessels engaged in the slave trade.<sup>2</sup> The claim of one of H. M. slave cruisers to share in the bounties for the capture of a slave vessel overruled.

THIS was a question as to the right of one of her Majesty's cruisers to share in the bounties arising from the capture of a slave vessel under the following circumstances:—

On the 6th of March, 1845, her Majesty's sloop Star, whilst cruising on the coast of Africa, descried a schooner in latitude 3° 10' north, and longitude 3° 43' east, whereupon sail was made in chase, and at 3. 30, A. M., The Star having coming up with the schooner, Captain Dunlop, the commander, boarded her, and found her fitted and equipped for the slave trade. Captain D., observing that several of the crew of the said schooner wore bandages on their heads, directed the surgeon of The Star to examine them, and a report being made that the men appeared to be cut and wounded on their heads with cutlasses, Captain D. caused the crew to be put in irons, and shortly after such order was made, one of the said crew stated that the schooner had been captured by her Majesty's sloop Wasp; that the crew of The Felicidade had killed the prize crew belonging to The Wasp, and that the wounds which were observed were inflicted at the time when the crew of the schooner killed the prize crew, and retook possession of their vessel. Upon this confession Captain D. ordered the second lieutenant of The Star to take charge of the schooner, and proceed with her to Sierra Leone for adjudication. In the progress of the voyage The Felicidade capsized in a white squall, and was totally lost, and proceedings were subsequently commenced

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<sup>1</sup> [S. C. 6 Notes of Cases, 174.]

<sup>2</sup> [The Sociedade Feliz, 2 W. Rob. 155.]



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The Felicidade. 3 W. Rob.

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in the Vice-Admiralty Court at Sierra Leone against the [ \* 46 ] said vessel, and the judge, \* by interlocutory decree, pronounced the said schooner at the time of the seizure to have been equipped for and engaged in the slave trade, and, as such, liable to forfeiture and condemnation.

A claim having been made by the commander, officers, and crew of The Star for the tonnage bounties granted by the 1 & 2 Vict. c. 47, a claim was also interposed on behalf of the commander, the officers and crew of her Majesty's sloop, The Wasp, to participate in those bounties, and an allegation was now brought in on their behalf, the admission of which was opposed. The allegation pleaded,

1st. That on or about the 27th day of February, 1845, her Majesty's said sloop Wasp, whilst cruising on the coast of Africa for the prevention of the slave trade, &c., fell in with and seized The Felicidade, a Brazilian vessel, then equipped for the slave trade, but without any slaves actually on board, and manned with a crew of thirty persons, including the master. That the whole of the crew, except the master and one other person, were removed on board The Wasp, and Lieutenant Stupart and Mr. Palmer, a midshipman, with sixteen seamen belonging to The Wasp, were put on board, with orders to convey her to Sierra Leone for adjudication.

2nd. That the two vessels having parted company, The Felicidade, on the 2d of March, 1845, fell in with and seized another Brazilian vessel called The Echo, with four hundred and thirty-one slaves on board, whereupon Lieutenant Stupart, with seven of his men, went on board The Echo, leaving Mr. Palmer in charge of The Felicidade with the remaining nine men belonging to The Wasp, the two persons of her own crew, and twenty of the crew of the brigantine The

Echo. That the two vessels remained in company during [ \* 47 ] the \* night, but on the following day the Brazilian people on board The Felicidade rose upon the said Mr. Palmer and his men, slew the whole of them, with the exception of two blacks, who jumped overboard, and swam ashore, and took possession of the vessel, and after making an ineffectual attempt to recapture The Echo, sailed away and stood out to sea, chased by The Echo, which being a bad sailer soon lost sight of her.

3d. That The Felicidade, having outsailed The Echo, stood to the southward towards the Isle of Princes, and whilst so standing during the night of the 4th of March, was fallen in with and captured by her Majesty's sloop Star, and that thereupon an officer and prize crew were placed on board the vessel with orders to take her forthwith to Sierra Leone to be dealt with according to law in the Vice-Admiralty Court. That whilst proceeding towards Sierra Leone she was

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upset in a squall and foundered, the persons on board her escaping on a raft, and being afterwards picked up by her Majesty's sloop Cygnet.

4th. That the usual proceedings having been instituted by her Majesty's sloop Star in the Vice-Admiralty Court at Sierra Leone, the judge condemned the said ship or vessel, but by error or mistake so condemned her, notwithstanding the premises, as captured by her Majesty's sloop Star, and not by her Majesty's sloop Wasp.

5th. That the bounties granted by act of parliament on the tonnage of the said ship or vessel, Felicidade, amounting to the sum of 1,298*l.*, or thereabouts, have since been paid by the lords of the treasury to Messrs. William and Edward Chard, as agents for the commander, officers, and crew of The Star, in virtue of the said in part erroneous sentence, and which sum is still in [ \* 48 ] the hands of the said W. and E. Chard, who have been duly warned on behalf of The Wasp not to proceed to distribution of the same, &c.

The admission of the allegation was opposed by *Queen's Advocate* and *Jenner* for The Star.

*Addams* and *Robertson*, *contra*.

PER CURIAM.

It is, I conceive, perfectly clear, that the same principles of law, which are applied to cases of prize capture in the time of war, are applicable to cases of this kind, where the subject-matter is the bounty granted on the capture or destruction of vessels engaged in the slave trade. The first question, then, which arises is, whether, supposing that this vessel had been a prize capture in time of war, the claim of the officers and crew of The Wasp could have been sustained by the facts which are pleaded in this allegation. I am clearly of opinion that it could not, and for this reason, namely, that the original seizers never completed their possession, and the incipient interest which they had acquired was entirely divested by the subsequent rescue. It has been said that the subsequent rescue was not a lawful recapture of the ship. Whether it was so or not, I am not called upon to determine in the present instance; and I gladly forbear to enter into the question, which, if I had to decide, would undoubtedly, be one of no ordinary difficulty. The present question is not whether the original seizers of this vessel were divested lawfully or not, but whether they were effectually divested. If they were, according to the principles heretofore laid down in the Prize Courts of this

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[ \* 49 ] country in the cases of *The Polly* and *The Marguerette*, and reported in the fourth volume of Sir Christopher Robinson's Reports,<sup>1</sup> their interest was entirely gone. That such was the case in the present instance, is apparent upon the very face of the case which is set up in this allegation. It has been said that the original papers of the slave vessel remained in the possession of *The Wasp*. I do not see that this can at all affect the question. I am of opinion that upon the facts declared in this allegation, the officers and crew of *The Star* were the efficient captors of the slaver, and, as such, are entitled to the whole benefit of the bounty. I must, therefore, reject the allegation.

Allegation rejected.

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THE VICTORIA,<sup>2</sup> Mallaburn.

May 5, 1848.

A vessel lying at anchor in a track frequented by other ships, is bound at night to exhibit an efficient light. The owners of a vessel so lying at anchor, and run into by a vessel under sail, held to have been in fault in omitting to exhibit such light.<sup>3</sup>

THIS was a cause of damage brought by the owners of *The Three Betseys* against this vessel, her tackle, &c.

The act on petition in substance set forth that *The Three Betseys*, of ninety-six tons, and manned with a crew of five hands, including the master, was bound on a voyage from Hartlepool to London, with a cargo of coals. That about 8, P. M., of the 8th of January, having arrived in the south-west Reach, she was brought up in six fathoms water, the middle light bearing N. E. by N., distant about two miles. That at half-past 2, A. M., on the following day, a brig, *The Victoria*, under full press of canvass, was observed at the distance of 300 or 400 yards, running about six knots an hour, in a direction

[ \* 50 ] for the midships of \* *The Three Betseys*. That the mate immediately ran forward, and shouted at the top of his voice, "port your helm; where are you coming to? Why do you not port your helm?" That such hailing was frequently repeated.

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<sup>1</sup> [4 C. Rob. 217, note.]

<sup>2</sup> [S. C. 6 Notes of Cases, 176.]

<sup>3</sup> [*The Scioto*, 1 Davies, 359; *Lenox v. Winnissimet Co.* 1 Law Rep. (N. S.) 80; *Carsley v. White*, 21 Pick. 254; *Simpson v. Hand*, 6 Whart. 324.]

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That, notwithstanding such hailing, the course of the brig was not altered, and within a minute or two the said brig ran stem on into The Three Betseys, just abaft the gangway on the larboard side, cutting her down to the water's edge; that the crew with difficulty jumped on board the brig, and found that she was under whole topsails, courses, trysail, and staysail. That at about half-past six the crew of The Three Betseys were taken on board a smack, and having proceeded to the spot where the collision took place, they found that The Three Betseys had sunk, her tops only being visible. That the said collision was solely owing to the negligence, want of skill, or other misconduct of the master and crew of The Victoria, and that if they had ported her helm at the time when they were hailed to do so from on board The Three Betseys the said collision would not have occurred.

The answer to the act on petition in substance pleaded, that The Victoria, of 136 tons, and navigated by a crew of five able seamen and three apprentices, was proceeding on a voyage from Newcastle to London, also coal laden. That between two and three o'clock in the morning of the 9th of January, the brig passed the Middle Light, leaving it on the larboard hand, and distant about two or three ships' length. That after passing the said light The Victoria continued running before the wind, not under full press of sail, as untruly alleged, but under easy canvass, and at the rate of from five to six knots an hour, having a single reefed topsail, foresail, and foretopmast

\* staysail, the mainsail being close hauled up, so as to hold [ \* 51 ] no wind, but not stowed. That, on account of the night being dark and cloudy, and of there being a number of vessels in ballast outward bound, and riding at anchor, the whole of the said brig's crew were on deck. That after passing several vessels so at anchor, but avoiding them severally, as she easily did by means of their lights, the master saw the light of another vessel at anchor some little distance ahead of his brig, and thereupon, to avoid it, ordered the brig's helm to be starboarded, which was done accordingly. That whilst the brig was paying off in that direction, a vessel, showing no light, (which proved to be The Three Betseys,) was suddenly seen by the master right before the brig's bows, with her head to the S. E., presenting nearly her broadside to the brig, and distant about a ship's length. That the master, immediately, seeing that a collision was inevitable, in order to ease the blow, ordered the brig's helm hard a-port, which order was obeyed, and the two vessels almost instantly came in contact. That The Three Betseys was bound to have shown a light, as did every other vessel at anchor in that neighborhood, and if she had done so

in all probability there would have been no collision. Whereupon, &c., &c.

A reply was given in by the owners of The Three Betseys, submitting that it was not compulsory upon The Three Betseys to have a light, and denying that the other vessels riding at anchor in the Swin had lights, and also alleging that there was a light hoisted in the rigging of The Three Betseys, which must have been visible to the persons on board The Victoria if they had kept a good look-out. That

The Three Betseys, at the time of the collision, was riding [ \* 52 ] at anchor close over towards The Neaps, and inside nearly all the other ships there at anchor; and that she was anchored in safe and proper anchorage ground, and out of the usual track of vessels going through the Swin. That it was the duty of the master of The Victoria to have brought his vessel up instead of proceeding through the Swin; and that, under any circumstances, it was his duty to have had his anchors and cable ready to bring up at a moment's notice, &c.

The case was argued before Trinity Masters by *Haggard* and *Jenner* for owners of The Three Betseys.

*Addams* and *Twiss* for the owners of The Victoria.

PER CURIAM.

Gentlemen, — It is admitted that The Three Betseys, the vessel proceeding in this cause, was lying at anchor, and was run into by The Victoria, the vessel proceeded against. I refer to this fact in the outset of my observations, because, in all questions of this kind, when a vessel at anchor is run down by a vessel under sail, the *onus probandi* lies with the vessel that is in motion, and she is *prima facie* bound to show a sufficient cause why she came in contact with the vessel which was stationary, and which was consequently comparatively helpless.<sup>1</sup> It may possibly be your opinion, in the present instance, that both vessels were to blame, or that the collision was occasioned by inevitable accident; as far, however, as I can form an opinion upon the subject, I must tell you it appears to me that the excuse of inevitable accident cannot be applied to the circumstances of this case. \* Let us then consider, [ \* 53 ] in the first place, whether The There Betseys was to blame or not. It is not contended that she was improperly anchored, or that she was anchored in an improper place. The blame that is imputed to

<sup>1</sup> [The Batavier, 2 W. Rob. 407.]

her is, that at the time of the collision she had not a light hoisted. This circumstance has been much pressed in the argument of the learned counsel for The Victoria. On the other hand, a great variety of cases have been cited by the counsel of The Three Betseys, for the purpose of showing what has been the principle laid down and recognized in former cases of this kind with respect to the obligation of vessels under sail at night to carry a light. Gentlemen, we have no need on the present occasion to enter into the consideration how far it is obligatory upon vessels under sail at night to carry or exhibit a light; the question is confined to the simple question, how far the obligation extends to vessels at anchor? This question has undergone much discussion in various cases which have occurred in this court; and the principle which has been laid down by the learned judges who have preceded me in this chair, and has been sanctioned by the first judges in the House of Lords, I apprehend is this, — that there is no such general obligation, although circumstances may exist which would render it obligatory upon the master of a vessel at anchor to exhibit a light for his own safety, and for the safety of other vessels. As far then as the conduct of The Three Betseys is concerned, the questions we have to consider are these: Did she exhibit any light at all? and if not, was she under the circumstances of this case bound to have exhibited a light? With respect to the first of these questions I entertain no doubt whatever, that no light was displayed on board The \* Three Betseys sufficient to [ \* 54 ] warn other vessels approaching to the position in which she was anchored. It is not stated in the act on petition that she had any light at all burning at the time. When the charge is made against her, in the answer to the act, that there was no light displayed on board her, the owners of The Three Betseys then mend their case, and say, “ We had a light, but we admit it was nearly out, and the mate was going up with a fresh candle to renew it.” The omission of this important fact in their original plea would lead me to doubt whether they had any light at all burning in the first instance. I need not, however, stop to speculate upon this point, because I am sufficiently satisfied in my own mind that at all events there was no effective light displayed at the time. I now come to the more important consideration in the case, the decision of which must rest with you, namely, whether looking to the season of the year in which this collision took place, the state of the night, and the locality in which The Three Betseys was anchored, it was not obligatory upon the master, as a matter of reasonable precaution, to have carried and exhibited an efficient light. If you are of opinion that the carrying and exhibiting such light would have tended to prevent the collision,



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I cannot but think that it was a duty imposed upon him to have done so, and for this reason, that all persons are bound to take due and proper care to avoid an accident; and no man can justly complain of an accident that happens to himself, if by reasonable and proper precaution he could have prevented it. That the carrying a light upon the night when this collision took place was a necessary and proper

precaution is, in a certain degree, admitted by the persons on board The Three Betseys,\* because they state in their reply to which I have already adverted, that they did carry a light in the first instance, and were about to renew it when the two vessels came into collision; if this be so, it appears to me, that it was only owing to a want of proper care on their part that the light was not actually burning at the time. With these observations, I shall leave this part of the case which regards the conduct of The Three Betseys for your determination. From your nautical experience you can best judge what would be the probability of a number of vessels passing through and being brought up in the Swin upon the night in question; what the difficulty or facility of such vessels seeing The Three Betseys, and what precautions were necessary and proper to be adopted on her part in order to avoid a collision. I will now, in conclusion, very shortly bring under your notice the case of The Victoria. According to her statement, she was proceeding up the river coal laden, with the wind from the east, and having just previously put her helm a-starboard to pass The Mazeppa, she suddenly came down upon The Three Betseys, which vessel she finds, as she says, lying nearly broadside to her. The first point, gentlemen, is, ought she, upon the night in question, to have proceeded up the Swin at all; secondly ought she not under the circumstances of the case to have proceeded at less speed and with greater caution. These points I leave to your judgment, and if you entertain any doubt upon them, we will, if you please, adjourn into the next room. The Trinity Masters retired for a few moments with the learned judge, and upon his return to the court Dr. Lushington said, with regard to the question,

whether any blame attaches to The Victoria, the Trinity Masters are of \* opinion that, under the circumstances of the present case, she ought not to have proceeded at the speed with which she was going. With respect to The Three Betseys they are also of opinion that there was no effective light displayed on board that vessel; and that looking to the period of the year, the state of the night, and the number of vessels likely to be in the neighborhood of her, it was her duty under such a combination of circumstances to have had a visible light burning. In that duty she failed,

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The Wirrall. 3 W. Rob.

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and consequently must be held to blame. The result is that the damage must be divided between the two vessels.

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THE WIRRALL,<sup>1</sup> Pearson.

May 16, 1848.

In a collision in the river Mersey between a steam-tug and a ferry-boat, held by the Trinity Masters that the proper station for the master or look-out man in such steamer is the bridge between the paddle-boxes.

THIS was a case of collision, promoted by the owners, master, and crew of the late steam-tug, The Flambeau, against this vessel, her tackle, &c. &c.

The collision took place in the river Mersey on the 19th of December last, and in consequence thereof The Flambeau was so much damaged that she shortly afterwards sunk.

The act on petition, brought in on behalf of the owner of The Flambeau, pleaded that The Flambeau, of eighty tons register, with an engine of eighty horse power, and having an efficient crew of nine persons, including the master, was chiefly employed as a tug in towing vessels into and out of the port of Liverpool. That shortly before 8 o'clock, A. M., of the 19th of December last, and about three quarters of an hour before high water, she left the Brunswick Pier-head, and proceeded at half speed down the river Mersey, close along the Liverpool shore, on the look-out for a vessel to tow out to sea. That the \* tide at such time was a flood-tide, with [ \* 57 ] the wind from S. S. E. and the morning was sufficiently clear to see the Cheshire shore across the river. That the master of The Flambeau was stationed on the bridge between the paddle-boxes, such being the proper station for the master, according to a well known rule respecting the Woodside ferry-boats, and other ferry-boats having a bridge, and plying on the river Mersey. That when The Flambeau arrived abreast of the Canning Gateway, being inside the buoy, and from forty to fifty yards distant from the dock wall, the master observed a vessel in the Albert Half-tide Basin, apparently coming out of the Canning Dock. That he thereupon ordered the engine to be slowed, thinking the said vessel might require the ser-

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<sup>1</sup> [S. C. 6 Notes of Cases, 199.]

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vices of a steamer. That the ebb tide had begun to run down close in shore, so that The Flambeau could not get to the wall by reversing her engines, and accordingly he directed the man at the wheel to star-board the helm, in order to go out into the stream, and turn the steamer round, so as to bring her up alongside of the wall of the Albert Dock. That two steam vessels, The William Stanley and The Skerrey Vore, were lying at anchor in the stream off the Canning Dock, the former being about 400 yards ahead of the latter, and both being outside the buoy, and about 250 yards from the dock; and a flat-boat, the only other vessel at anchor in that part of the river at the time, was also anchored about 200 yards ahead of The William Stanley, and abreast of the south end of the great landing stage, but more out into the river. That the master of The Flambeau, intending to pass ahead of The William Stanley, and between her and the flat, at the moment when his steamer was passing the buoy, [ \* 58 ] observed The Wirrall out of her direct \* course, coming across the river, with her head a little to the eastward of north-east, and about half way over, and apparently making for the passage between The William Stanley and the flat. That he there-upon ordered the engineer to ease and stop The Flambeau's engine, and directed the helm to be put a-port, which was done, and after a few seconds, the flood-tide still running, The Flambeau lost way. That there was not any one on the paddle-box of The Wirrall, which still continued on her course, and when within about half a ship's length distant, her helm was apparently ported, and the master was seen to run up from the deck to the paddle-box, but the moment he got there The Wirrall came stern on full speed into The Flambeau. That The Flambeau began to fill immediately, and in about seven minutes sunk in deep water. The remainder of the act, after again reciting that it was the duty of the master of The Wirrall to have been upon the bridge between the paddle-boxes, concluded with the averment, that the collision was imputable to the want of a good look-out on board The Wirrall or otherwise, and was in no degree attributable to the persons on board The Flambeau.

In answer to the act on petition, it was, in substance, pleaded, that The Wirrall was proceeding from The Woodside ferry ship, with passengers, across the Mersey, to the broad slips, St. George's Pier, Liverpool; that on the occasion in question, when about half way across the river, The Flambeau was observed, opposite the warehouses of the Albert Docks, going down the river near the shore, The William Stanley lying at anchor about 290 yards distant from the Canning Dock wall; that when The Wirrall had arrived abreast [ \* 59 ] of The William Stanley, and about \* half a cable's length

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outside of her, The Flambeau had arrived abreast of The William Stanley on the inside, her course then being about north-east by east; that immediately after she had passed The William Stanley, and with a full knowledge of the course of The Wirrall, The Flambeau's helm was suddenly put hard a-starboard, and her course altered to about west by north, directly across the bows of The William Stanley, whereupon the master of The Wirrall, fearing a collision to be inevitable, immediately ordered the helm of his vessel to be ported, and the engine to be stopped and reversed, or turned ahead; that such orders were immediately executed, and The Wirrall's engine made four or five revolutions ahead, but that, before she entirely lost her way, the two vessels came into collision, The Wirrall striking The Flambeau on her larboard bow with her stern, and cutting her down to the water's edge. The answer then went on to deny that The Flambeau was prevented by the ebb tide from getting to the wall of the Canning Dock, by means of reversing her engine, or that she put her helm a-port after she had put it a-starboard to pass ahead of The William Stanley; or that, after she had so starboarded her helm, she ever altered her course, or that The Wirrall was at the time out of her direct course. On the contrary, it alleged that The Wirrall was in her direct course from Woodside slip to the landing places at Liverpool; that it was by no means necessary for the masters of ferry-boats to stand on the paddle-box in order to keep a proper look-out; and that, at the time in question, the master of The Wirrall was standing abaft the paddle-box, in a line with the aft companion, where he could keep as good a look-out as on the paddle-box, and could see and be seen by the helmsman, who was standing \* on a platform raised three feet nine inches above the [ \* 60 ] deck; and that whilst so standing, he was in a better position to give directions to the engineer, as the handles, or starting bars, for working the engines, were on deck. The answer then denied other averments set up by The Flambeau, and, in conclusion, alleged that, had not The Flambeau so suddenly altered her course, The Wirrall might and would have passed without any chance of collision, and that the same was entirely attributable to The Flambeau.

The case was argued before Trinity Masters by

*Robinson and Twiss*, for The Flambeau.

*Addams and Bayford*, for the owners of The Wirrall.

PER CURIAM.

Gentlemen, — We have two questions to decide; first, whether The

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Flambeau, the vessel proceeding in this cause, was in any part of her conduct herself to blame; secondly, whether The Wirrall, the vessel proceeded against, was guilty of the neglect or misconduct which is imputed against her. The statement of The Flambeau, as it is set forth in the affidavit of Newton, the master, is to this effect, namely, that, having left the Brunswick Pier-head shortly before 8 o'clock, A. M., of the 19th of December, he was proceeding down the Mersey on the look-out for a towage employment, and when abreast of the Canning gateway he observed a vessel apparently coming out of the Canning Dock; that, thinking the vessel might require the service of a steamer, he directed the man at the wheel to starboard the [ \* 61 ] helm, \*in order to go out into the stream and turn the steamer round, and so try to keep alongside of the wall of the Albert Dock, the ebb tide having begun to run down close ashore, so that The Flambeau could not get to the wall by reversing her engines. Gentlemen, it is, I think, perfectly clear that the tide was ebbing; how far that circumstance would render it necessary for The Flambeau to go out into the stream, and turn round, in order to speak the vessel coming out of the dock, is a question for you to determine. The master then goes on to state, that, intending to pass ahead of The William Stanley, which was lying at anchor outside the buoy, and about 250 yards from the dock wall, and between her and a flat, which was also anchored about 200 yards ahead, at the moment when he was passing the buoy, observed The Wirrall coming across the river, with her head a little to the eastward of north-east, and about half-way over, apparently making for a passage between The William Stanley and the flat, her point of destination being the landing steps at the north end of the George's pier; that he thereupon called out to the engineer to ease, and then to stop the engine, and ordered the helm to be put a-port, and these orders were immediately obeyed, and shortly afterwards The Wirrall came stern on, full speed, into The Flambeau, striking her on the larboard side, about eight or ten feet abaft the stern, &c. &c. Such, in substance, is the case of The Flambeau, as it is stated by the master in his affidavit. According to this statement, it appears that the helm of The Flambeau was starboarded in the first instance, and, when the approach of The Wirrall was observed, was immediately put a-port, and was a-port at the time of the collision. This fact is denied on [ \* 62 ] the part of \* The Wirrall; and it is alleged, after the helm of The Flambeau had been ported, it was subsequently, by order of the master, put hard a-starboard, and that it remained so at the time of the collision. The evidence in the cause, I think, clearly preponderates in favor of The Flambeau's statement, because it is

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admitted on all sides that The Flambeau was struck on the larboard side, between the stern and the windlass, about eight or ten feet abaft the stern. Subject to your better judgment, gentlemen, it appears to me that if the helm of the vessel was starboarded, and she was in a condition to obey the helm, her engines being reversed, she would necessarily have come round; and in that case it is impossible, I apprehend, that she could have been struck on the larboard, and not on the starboard side. So much, gentlemen, for the case of The Flambeau. With respect to The Wirrall, she was proceeding with passengers across the Mersey, for the Cheshire shore and the broad slips at St. George's pier, Liverpool; and it is admitted that, at the time The Flambeau was sighted, the master was standing abaft the paddle-box, and was not on the bridge between the paddles, which, it is alleged on the other side, was his proper station, according to the admitted rule as relates to ferry-boats plying on the river Mersey. How far this fact of his being so stationed was likely to prevent the master of The Wirrall from descrying The Flambeau as soon as he otherwise might have done, it must rest with your nautical judgment to determine. If you shall be of opinion that, in consequence of his not being on the bridge, his observation of the vessels was rendered less certain and accurate, the circumstance is an all-important feature in the case, as tending to fix the blame of the collision upon The Wirrall. \* According to his own statement, the posi- [ \* 63 ] tion in which he was standing afforded a better position to give directions to the engineer, and at the same time enabled him to keep as good a look-out as on the paddle-box. How far this fact be true or otherwise, I cannot venture to judge; thus much, however, I may assert, namely, that, looking to the locality in which he was navigating, and the crowded state of the river, it was his duty not only to have been in a position to have kept the best possible look-out, but he ought to have kept such look-out. Another statement of the master of The Wirrall to which I would direct your notice, is, that, perceiving the helm of The Flambeau to have been put a-starboard, he thereupon ordered the helm to be ported, and the engine to be stopped and reversed. What his object was in so porting his helm, I do not clearly understand. If it was his intention, by porting his helm, to have gone between The Flambeau and The William Stanley, there would not, I conceive, according to the evidence before us, have been sufficient room for such a manœuvre. If, on the other hand, he intended to pass round The William Stanley, he should, in my humble judgment, have ported his helm at an earlier period, in which case, I apprehend, no collision would have occurred. With these observations, gentlemen, I must now request your opinion and



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The Lively. 3 W. Rob.

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advice, whether, under the circumstances of the case, the collision, taking place in daylight, and there being every opportunity of seeing vessels, the persons on board The Wirrall ought not to have seen The Flambeau in sufficient time to have enabled them to have avoided this most unfortunate accident.

[ \* 64 ] The *Trinity Masters* being of opinion that the \* collision would have been avoided if the master of The Wirrall had been at his proper post on the bridge between the paddles, and had kept a proper look-out, and that no blame was imputable to The Flambeau, the court pronounced for the damages, with costs.

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THE LIVELY,<sup>1</sup> Chickley.

May 19, 1848.

An agent at Lloyd's is not entitled to sue as a salvor for the mere hiring and engaging of men to assist a vessel in distress. Claim of alleged salvor dismissed, with costs.<sup>2</sup>

THIS was a cause of salvage promoted by George Huxham, of Swansea, against this vessel, &c.

The action was entered in the sum of 351*l.*, and the act on petition of the salvor set forth, that, on the night of the 25th of January, 1847, during a heavy gale of wind from S. S. W., the brig Lively, of 229 tons, parted from her anchors in the Mumbles roadstead, and was driven on shore in Swansea Bay, about a mile to the westward of the pier; that the said brig at the time had on board a cargo of 400 tons of coals, and on the ebbing of the tide she was abandoned by the master and the rest of the crew, being at such time in a very dangerous and leaky state, and having sustained very considerable damage to her bottom and rudder by beating against the ground; that, on the following morning, the master of the said brig called upon G. Huxham, the alleged salvor, at his residence in Swansea, and requested his assistance to save his vessel and the cargo on board, and bring her into port, which said G. H. promised to do; that he thereupon, upon his own responsibility, engaged the services of thirty-

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<sup>1</sup> [S. C. 6 Notes of Cases, 206.]

<sup>2</sup> [See *The Purissima Conception*, 3 W. Rob. 181; *The Traveller*, 3 Hagg. Ad. R. 172.]

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The Lively. 3 W. Rob.

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four men, together with six horses and four carts, to act under his directions and orders; and having proceeded down to the vessel, directed some of the persons so engaged to work the pumps, \*and others to make preparation for getting out the cargo; [ \* 65 ] that on the following day he superintended the said parties in discharging the cargo and stripping the vessel of her rigging, and ordered anchors to be carried out in such a direction as to prevent the said vessel from getting higher on the shore; that on the next day, The Lively having been sufficiently lightened, the said G. H. engaged the aid of a powerful steam-tug, which, with the assistance of the men he had originally engaged, hauled on the anchors, and, after great exertion, succeeded in getting the vessel afloat, when she was immediately towed into the harbor, where she remained under the charge and superintendence of the said G. H. until the 3d of February following, on which day the owner of the vessel arrived, and the said G. H. gave up any further care and superintendence of her.

The answer of the owners in substance alleged that during the time in question the said G. H., the asserted salvor, was the agent at Swansea for the committee of Lloyd's; that the master of The Lively, having no consignee nor agent at Swansea, called on the said G. H. to report to him, as Lloyd's agent, the stranding of the said vessel, believing it to be necessary, with a view to future communications with the underwriters, that the earliest information of the accident should be given to the agent for Lloyd's; that the said master did not, on such occasion, apply for advice or assistance, nor had, in point of fact, abandoned his vessel; that the said G. H., being himself utterly incapable of advising the master as to the means of getting his vessel off afloat, called with the said master upon J. R., who was for many years surveyor of Lloyd's Register of British and Foreign Shipping, for the purpose of obtaining his advice and \*assistance, and that the subsequent measures adopted [ \* 66 ] for that purpose were suggested entirely by the said J. R.; that none of the operations for getting the brig off the beach, and towing her into harbor, were performed by the advice and direction, and under the superintendence of the said G. H., and the only work performed by him previous to the interposition of the said J. R. was the stripping the brig of part of her rigging and stores, which was quite unnecessary to be done, and of no use whatever; that the said G. H. has no claim nor right to a salvage reward, and that in respect of whatever agency or services he performed, he had been sufficiently remunerated, having, in addition to the sum of 118*l.* 5*s.* 6*d.*, which he has received for disbursements and other charges, been paid for

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his agency in respect of the said brig and her cargo a further sum of 20*l.*; that until the arrest of the vessel in this cause, no claim or pretence of salvage of the said brig was set up by the said G. H. or any other person; that the brig, having undergone her repairs, and shipped a cargo, proceeded from Swansea, bound to Quebec, on or about the 5th of May, 1847; that the intended departure of the said brig was well known to the said G. H., who took no steps to make any further claim or demand, or to enforce or recover any further amount; that in the month of October, 1847, the said brig, under the command of a new master, arrived in the port of Swansea, whereupon the said G. H. obtained the warrant of this court, and arrested the vessel, laying his action in the sum of 350*l.*

The case was argued on behalf the salvor by

*Bayford and Twiss.*

*Haggard and Harding, contra.*

[ \* 67 ]    \* The court, without calling upon the counsel of the owners, delivered its judgment to the following effect.

PER CURIAM.

It is unnecessary for me to notice any of the facts which are put in controversy between the parties in this suit, because I am satisfied that, according to the precedents of all former cases of this kind, the claim of the asserted salvor cannot be supported. Whether Mr. Huxham himself hired the persons by whom the vessel was unloaded and assisted, or whether the alleged assistance was or was not rendered under his personal superintendence and directions, is of no importance to the question which I have to determine. Mr. Huxham, it is clear, at the time he took charge of the vessel, did so in his capacity of Lloyd's agent at the port of Swansea, and as such only discharged the duty which was properly incumbent upon him in rendering his assistance to the master. If I was to sanction a claim of this description, it would inevitably happen that in every case where a vessel met with any misfortune in the neighborhood of any seaport where a Lloyd's agent was established, and he was applied to by the master to hire a steam vessel or sailors to render assistance, such agent would be entitled to come to this court and sue as a salvor, he himself doing nothing to effect the salvage. My predecessors in this chair have uniformly set their faces against such attempts, and I shall not depart from their example in the present instance,

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more especially when I look to the late period of time when these proceedings were commenced, and the manner in which they have been carried on. I pronounce against the claim, with costs.

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\* THE CHARLOTTE,<sup>1</sup> Hawkins.

[ \*68 ]

June 24, 1848.

The owners of boats rendering a salvage service, not having been personally present at the time the service is rendered, are not entitled to sue as salvors. Some remuneration, however, is due to them for the use of their boats, by way of equitable compensation.<sup>2</sup>

THIS was a cause of salvage brought by William Thomas and John Thomas, the owners, and John Connor and others, the crews of four boats, for services rendered to this vessel on the 18th of December last.

The vessel, it was alleged by the salvors in their act on petition, was proceeding on a voyage from Bombay to the port of Liverpool, and on the evening of the 17th of December, in consequence of the master mistaking the Crookhaven Harbor Light for that of the Old Head of Kinsale, she became embayed amongst the breakers in Roaring Water Bay, distant about a mile and a half from the mainland of Coosheen, in the county of Cork, the wind at such time blowing a violent gale, with fog and rain, and a tremendous sea running, which drove the ship towards the rocks; that both anchors were thereupon let go, but they would not hold, and in consequence thereof, her masts were by order of the master cut away, and went overboard with all the sails and rigging; that in this dismasted state she was observed by John Thomas, superintendent of the Coosheen Fishery, and he having induced a crew of five boatmen to join him, launched a boat through the surf, and proceeded to board the ship, but after several attempts, in consequence of the violence of the gale, was unable to reach her; that the gale having afterwards moderated, a second boat was despatched by the said J. Thomas, and having

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<sup>1</sup> [S. C. 6 Notes of Cases, 279.]

<sup>2</sup> [As to claims of owners of vessels for salvage, see *The Vine*, 2 Hagg. Ad. R. 1; *The Jane*, 2 Hagg. Ad. R. 343; *The Salacia*, 2 Hagg. Ad. R. 264; *The Martha*, 4 Hagg. Ad. R. 436; *The Blendenhall*, 1 Dod. 417; *The Baltimore*, 2 Dod. 138; *The Nath'l Hooper*, 3 Sumn. 542, 575.]

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The Charlotte. 3 W. Rob.

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succeeded in reaching her, the captain of the said ship returned in her to Coosheen, and proceeded to the house of the said [ \* 69 ] J. T., where he slept; and on the \* following morning he proceeded to Cork for the purpose of engaging a steamer, having previously requested the said J. T. to rescue his ship, and having despatched a note to the chief mate, authorizing and requiring him to give up the charge of his ship to J. C., the person employed by the said J. T. to rescue the said ship; that the said ship having been taken in tow by the four boats, was, by great exertion and labor, kept clear of the breakers, and forced through a heavy sea then rolling, and towed into Long Island Channel, where she was anchored in safety about 2 P. M. of the 18th of December; that on the 21st of December a claim for salvage in respect of the said services was made against the said ship, and she was surrendered by the salvors into the custody of the receiver of droits for the district, in which such services were rendered, pursuant to the statute; and on the 23d, while the said receiver and two of his men were on board, she was forcibly removed from Long Island Channel, and towed to Liverpool, without any communication with or notice to the said J. Thomas or any of the salvors.

The defence of the owners, as set forth in the answer to the act on petition, in substance alleged, " that at the time the alleged salvors first descried The Charlotte, she lay at least half a mile from any breakers, and that she was holding by and not dragging from her anchors; that the storm gradually abated, and the sea went down as the evening drew on, and that between 7 and 8 o'clock it was a fine moonlight night, and clear weather; that the master, being anxious to get a steamer as soon as possible, went on shore to the house of the said J. Thomas, without any difficulty, leaving his vessel in charge of the [ \* 70 ] mate, and on the following morning, previous to \* his setting out for Cork, intimated to the said J. T. that he would give each of the boats twenty shillings for their services, with which the said J. T. seemed perfectly satisfied; that the said J. T. having gone on board The Charlotte, the mate, who was in charge of the ship, wrote an order for twenty shillings for each of the boats, and delivered it to the said J. T.; and that it was distinctly understood between the said J. T. and the said mate that the said sum was to be the full pay for all the services rendered to the said ship; that during the whole time the alleged salvors were engaged in the service of the said ship the sea was calm, and the weather fine, and beyond the service of towing the ship into Long Island Channel, under the agreement aforesaid, no salvage service whatever was rendered to the said ship.

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The Charlotte. 3 W. Rob.

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*Queen's Advocate and Phillimore, for the owners.*

*Robinson and Twiss, contra.*

JUDGMENT.

DR. LUSHINGTON. The first question in this case is, whether, under the circumstances detailed in these proceedings, any salvage service has been performed at all. According to the statement of the salvors, in their act on petition it appears that upon the 17th of December last, the vessel, whilst in the prosecution of her voyage from Bombay to Liverpool, arrived off the southern coast of Ireland, and in consequence of the master mistaking the Crookhaven Harbor Light for the Old Head of Kinsale Light, he got into a position of danger in Roaring Water Bay, amongst the breakers running between Long Island and the Western Calf \* Island. The wind, it [ \* 71 ] is represented, was at this time blowing a gale, with fog and rain, and a tremendous sea running, and the vessel was driving towards the rocks, whereupon both her anchors were let go, and these not holding, her masts were, by order of the master, cut away, and went overboard, with all the sails and rigging. In this position she was discovered by one of the alleged salvors; and on the following morning, by the assistance of four boats' crews, she was towed into Long Island Channel, and there anchored in safety about 5 P. M. of the 15th of December. It is to be observed, in the answer on the part of the owners, that although they generally deny that the vessel was in a situation of proximate or immediate danger, or that the anchors would not hold, no contradiction is attempted with respect to the locality in which the vessel lay, or as to the more important fact, that her masts and all her sails had been cut away, and that, in her dismasted state, she was towed into Long Island Channel, as stated.

Looking to these facts, which must be taken as admitted facts, I cannot but think that the service of bringing this vessel to anchor in Long Island Channel was *primâ facie* a service of salvage. According to the principles which are recognized in this court in questions of this description, all services rendered at sea, to a vessel in danger or distress, are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute; it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered. Under the circumstances of the case, therefore, I \* have no hesitation in concluding that a salvage service, in [ \* 72 ] the legal sense of the term, has been rendered in the present



instance. The next point to be considered, is, who are the salvors? In addition to the crews of the four boats, a claim has been made by two individuals to be considered as salvors, upon the ground that the boats and the boats' crews, by whom the service was actually rendered, were under their command, and were despatched by them upon the service in question. Assuming the fact to be so, does this constitute a salvage service? I apprehend not. In order to entitle a person to share as salvor, he must, I conceive, have been personally engaged in the service. This principle has long prevailed as the acknowledged doctrine of this court, and was recognized by Lord Stowell, in delivering his judgment in *The Vine* (2 Hagg. 61). "It is (says that eminent judge) a general rule, that a party, not actually occupied in effecting a salvage service, is not entitled to a salvage remuneration. The exception to this rule, that not unfrequently occurs, is in favor of owners of vessels which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed." Feeling it my duty, as it is my inclination, to uphold this principle in the present instance, I must altogether reject the claim of the two Messrs. Thomas to be considered as salvors. Some remuneration may be due to them for the use of their boats, by way of equitable compensation; but with the actual performance of the salvage service I must hold that they had nothing whatever to do. It

now remains to be considered whether any agreement has [ \* 73 ] been made \* between the salvors and the owners of *The Charlotte*, which should act as an estoppel to their claim for salvage. The fact that any such agreement was made rests upon the evidence of the master and the first and second mates of *The Charlotte*, and the order for the payment of twenty shillings for each boat delivered by the mate Hawkins to John Thomas, under an agreement, it is said, that it was to be a discharge in full for all the services rendered. This averment is denied by William and John Thomas, and I must confess that, having gone through the whole of the evidence, I have felt much difficulty in satisfying my mind upon the point. The alleged agreement is pleaded in a most loose and unsatisfactory form. As a plea in bar it ought to have been pleaded with great particularity, in order to raise the issue in the plainest manner; on the contrary, it is pleaded in the shape of a long conversation between Robert Hawkins and John Thomas, to the following effect: — "That Robert Hawkins, without receiving from John Thomas any intimation of the conversation which had taken place between John Hawkins and himself, respecting the remuneration for the services of the

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boats, remarked that twenty shillings each boat would, he supposed, be good pay, to which John Thomas assented; and Robert Hawkins thereupon wrote an order on William Thomas for twenty shillings for each of the boats, which order he delivered to John Thomas in the presence of the second mate and of the steward of the said ship; nothing whatever was said as to such order being given with the intention of inducing the crews of the Cape Clear boats to accept the remuneration which the mate had agreed to give them; nor did John Thomas state, or in any way lead Robert Hawkins to infer, that he \*accepted the order on the understanding that the same [ \* 74 ] was not to be considered as a remuneration for his father's four boats, but only for those of the Cape Clear boats. On the contrary, it was distinctly understood between said Robert Hawkins and said John Thomas, that the twenty shillings for each boat was to be the full pay; and when the said John Thomas had read the order, he remarked that it would do very well, as it was all right, or words to that effect, and took it to shore with him." Can any averment of an alleged agreement be more loosely pleaded than this? It was distinctly understood between Robert Hawkins and John Thomas that the twenty shillings for each boat was to be the full pay. How am I to collect from this conversation what was the impression upon the mind of John Lewis, with respect to the meaning to be attached to it? The evidence, I regret to say, leaves me equally in the dark; and the utmost inference that I can deduce, is, that, in the mind of Hawkins the mate, at least, there was an impression that an agreement had been validly concluded. But even assuming for the moment that John Thomas himself participated in this impression, I do not see that it would conclude the claim of the actual salvors upon the present occasion. What right had John Thomas to bind them by any such agreement? The rule of law is, that no person can be legally bound by any contract unless he has entered into it himself, personally, or through a duly authorized agent, or has by his own act subsequently ratified that contract. The salvors themselves have repudiated throughout that they ever authorized William Thomas to act for them in the matter; and the agreement has never been confirmed, or in any manner ratified by them; it must, therefore, fail for want of authority. Having \*arrived at this conclusion, it [ \* 75 ] only remains for me to determine what is the *quantum* of remuneration to which the salvors are entitled. Being of opinion that there was no great labor, not much difficulty, and no risk encountered by them in the performance of the alleged service, I think I shall meet the justice of the case by allotting 5*l.* to Connor, 2*l.* to each of the men composing the crews of the several boats, and 5*l.* to

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The Birkenhead. 3 W. Rob.

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the Messrs. Thomas, not as salvors, but for the use of the boats. With respect to the costs, I decree the costs of the suit against the owners from the time of giving in the act on petition; the charges attending the arrest of the vessel, and those relating to the bail, to be borne by the salvors.

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THE BIRKENHEAD,<sup>1</sup> Ingram.

July 12, 1848.

The commander of a steam vessel of war condemned in a cause of damage. The excuse that the vessel which was run down was mistaken for a fishing vessel at anchor, and that the helm was starboarded to avoid the fishing nets, not sustained. The steamer should have eased or reversed her engines, and have ascertained the fact, instead of proceeding on her course.

THIS was a cause of damage by collision, brought by the owners, the master and crew of the late brig The Horatio, and the owners of the cargo laden on board, against her Majesty's steam frigate The Birkenhead, Henry Ingram, Esq., commander.

The act on petition pleaded, that The Horatio, belonging to the port of South Shields, of the burden of 239 tons, and navigated by a crew of nine hands, including the master, sailed from Enos, in the Archipelago, on the 28th of June last, laden with a cargo of Indian corn and wheat, bound to Falmouth for orders; that on the 9th of September she arrived at Falmouth, and on the 15th was proceeding from Falmouth to Liverpool, and about quarter past 8 P. M. was off the Lizard Light, which bore N. E. by E., distant about ten miles, the wind at the time blowing a strong breeze from about W., with a [ \* 76 ] good deal of sea, and the \* night being cloudy overhead, but sufficiently clear for a vessel to be seen from another a mile off; that the brig was under double-reefed topsails and reefed trysails, lying about N. N. W., close-hauled to the wind on the larboard tack, and going through the water at about three and a half knots an hour; that a little before 9 P. M., in which interval the brig had passed several vessels on the starboard tack, the mate, who was on the weather gangway, and W. H., who was forward on the look-out, saw two lights, namely, those of her Majesty's steam frigate Birkenhead, nearly in the wind's eye, and approaching the brig with great rapidity; that

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<sup>1</sup> [S. C. 6 Notes of Cases, 365.]

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The Birkenhead. 3 W Rob.

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immediately upon such lights being seen, the mate went to the companion, and, taking up a lantern which was there kept in readiness for the purpose, showed it three feet above the brig's rail for several minutes, first over the weather gangway and then at the weather bow, during which time the brig kept her course, being still close-hauled on the larboard tack; that shortly afterwards a third light, lower down, became visible to the persons on board the brig, and the steam frigate was seen coming in the direction of the brig, with the wind free, and at the rate of between ten and twelve knots an hour; that the steam-ship rapidly approached without in any way altering her course, when, seeing that a collision was inevitable, the mate ran back from the bow of the brig to the weather gangway, still showing the light, and called to the man at the helm to put the helm hard a-port, with a view to ease the violence of the collision, by making the vessels come together in a slanting position; that the helm was thereupon instantly ported, and the steam frigate was loudly hailed to put her helm a-starboard, but that before \* the brig [ \* 77 ] had time to fall off, the said steam frigate ran right into the larboard bow of the brig, passing completely over her forepart, and carrying away the bowsprit, foremast, maintopmast and figure-head, cutwater, rails, &c., &c., and causing large quantities of water to rush down the forecastle; that on the following day, the 16th of September, The Horatio having become nearly water-logged, the crew quitted the brig, which was never afterwards heard of, but, with her cargo and private effects of the master, crew, and passengers, was totally lost; that, at the time of the collision, the paddle-wheels of the steam frigate were in such rapid motion as to show that her steam could not have been at all eased off, and that the said collision was imputable solely to the negligence and want of care of those on board the steamer, &c., &c.

On behalf of her Majesty's steamer, The Birkenhead, it was alleged: "That about 8 P. M. of the 15th September, the course of the said ship, after passing the Longships Light, was altered to S. E.  $\frac{1}{2}$  S., there being a strong breeze from the W. with a good deal of sea, and the night very dark though not thick; that her sails had been taken in, and her main and mizen topmast had been struck since 6.30 of that evening, and she was going under steam only at the rate of between eight and nine knots, her engines working on the second step of expansion; that on account of the first lieutenant being on the sick list, R. W., an experienced and trusty warrant officer, was officer of the watch, and the regular watch, consisting of five men, was on deck at their different stations; that about 9.30 the Lizard

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The Birkenhead. 3 W. Rob.

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Light, bearing N. E.  $\frac{1}{2}$  N., and distant about five miles, and [ \* 78 ] the \* steam frigate keeping her course at the speed of between eight and nine knots per hour, J. T., who was on the starboard paddle-box looking out, observed a light on the starboard bow, which he immediately reported to R. W., the officer of the watch, who thereupon got upon the paddle-box boat and also saw the said light; that they were both of opinion that the light so observed was that of a fishing boat lying at her nets, they having previously passed through a large fleet of fishing boats lying at their nets; that the said R. W. ordered the helm a-starboard for the purpose of going to leeward of such supposed fishing boat, and thereby avoiding her net; that on approaching nearer, it was discovered that the light proceeded from a brig on the port tack, whereupon the said R. W. ordered the helm to be put hard a-starboard, and the order was instantly obeyed; that the said R. W. also hailed the brig to put her helm a-starboard; that this was at first done, but that the helm of the brig was subsequently put to port, and in about two minutes after it was discovered that the light proceeded from a brig, and about five minutes after such light had first been seen from The Birkenhead, such brig struck The Birkenhead stem before the forepart of the starboard forerigging, and then swung alongside and dropped astern; that a good look-out was kept on board the steam frigate, but that the night being very dark, the light from the brig *Horatio*, when first seen, was mistaken for a fishing vessel at her nets, and that when it was found that such light was the light of a brig, it was not possible by any means to avoid the collision which happened, but that the same is to be attributed to unavoidable accident owing to the darkness of the night.

[ \* 79 ] \* The case was argued before the *Trinity Masters* by

*Addams* and *Twiss* for the owners of The *Horatio*.

*Queen's Advocate* and *Phillimore, Adm. Adv.*, for H. M. ship The *Birkenhead*.

#### JUDGMENT.

DR. LUSHINGTON. Gentlemen,— In forming our judgment in this case we must be guided entirely by the facts which are disclosed in the evidence, without reference to the circumstance that the vessel proceeded against is a vessel of war, and at the time of the collision was under the command of an officer in her Majesty's navy. The case itself lies in a very narrow compass. It is alleged by the owners

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The Birkenhead. 3 W. Rob.

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of The Horatio, the promoters of the suit, that about a quarter past eight, P. M., on the 15th of September last, The Horatio was off the Lizard Light, in charge of the mate's watch, which consisted of the mate and three other seamen, the wind at such time blowing from the west, and the brig lying about N. N. W., close hauled on the larboard tack, the Lizard Light appearing N. E. by E., distant about ten miles. In this position the steam vessel, The Birkenhead, was descried approaching her, and no doubt can be entertained, that, under the circumstances, it was the duty of The Birkenhead to have given way. What was the conduct of the persons on board The Horatio? They immediately displayed a lantern three feet above the brig's rail, and kept it hoisted for several minutes, first over the weather gangway, and then at the weather bow, the steamer apparently approaching them in that direction. Seeing that the steamer still continued her course \* towards them, and when the two vessels [ \* 80 ] were in close proximity, the mate, in order to ease the collision, directed the helm of The Horatio to be ported, and the steamer was loudly hailed to put her helm a-starboard. How far this act of putting the helm of The Horatio to port was a proper and prudent measure it will be for you, gentlemen, to determine. As regards what was done on board that vessel in the first instance, it is, I apprehend, perfectly clear that the mate and the watch on deck, at all events, acted prudently and properly in hoisting and displaying the light. Let us now see what is alleged on behalf of H. M. S. The Birkenhead. The statement in the answer to the act on petition is shortly to this effect:—“That after passing the Longships Light, the course of The Birkenhead was steered S. E.  $\frac{1}{2}$  S., the wind blowing strong from the W., with a heavy sea, and the night very dark, but not thick; that her sails had been taken in, and her main and mizen' topmast struck since half-past six o'clock, and she was going under steam only, at the rate of between eight and nine knots an hour. Whilst so proceeding, the light from on board The Horatio, it is further stated, was perceived by Thompson, one of the look-out men on the starboard paddle-box, and he having reported it to the officer of the watch, they were both of opinion that it was the light of a fishing boat lying at her nets, and, with a view to avoid her nets, the helm of The Birkenhead was starboarded, and she was steered to leeward; that soon afterwards it was discovered that the light came from a brig on the port tack, and the helm was then put hard a-starboard, the brig being hailed to do the same; that the brig, instead of starboarding, ported her helm, and in consequence thereof the two vessels came into collision, the brig \* running into the steamer, stem on.” Such, gentlemen, is [ \* 81 ] in substance the case which is set up by The Birkenhead; and



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The Birkenhead. 3 W. Rob.

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the question we have now to consider is, whether the collision, according to these two statements, was occasioned by any negligence or want of precaution on the part of the persons on board her. With respect to the rate at which The Birkenhead was steaming, I do not think it necessary to address any observations to you in the present instance, because I do not think that the point of the case turns upon the speed of the vessel, or the darkness of the night. The question is, whether the proper precaution was, under the circumstances of the case, taken at the time when the light of The Horatio was first discovered. It has been urged that The Birkenhead having previously passed through several fishing boats, the watch were justified in supposing the light on board The Horatio to proceed from a vessel of a similar description, and that the measure they adopted was a proper measure, and in accordance with such a supposition. Considering what had occurred before, I do not think that it was an unreasonable supposition to be entertained by them. At the same time, I would suggest to you, gentlemen, whether it would not have been a more prudent and proper measure, if, instead of proceeding in their course, they had reversed or eased their engines until they had ascertained the fact; and if this precaution had been adopted, it does appear to me that the collision might have been avoided; more especially, looking to the fact, that The Birkenhead was a steam vessel, and might have passed The Horatio on either side. Under all the circumstances of the case, I am bound to tell you, gentlemen, that the [ \* 82 ] case which is set up by the \* steamer, in my opinion, does not exonerate the owners from blame upon the evidence before the court. It will be for you to say how far you agree with me in this opinion.

*Trinity Masters.* We think that proper precaution was not taken on board The Birkenhead. Being a steamer, she might have passed on either side of The Horatio, if the necessary measures for so doing had been adopted in time.

PER CURIAM.

The *Trinity Masters* having expressed their opinion that The Birkenhead was to blame, I pronounce for the damages with costs.

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The Gauntlet. 3 W. Rob.

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THE GAUNTLET,<sup>1</sup> Kennedy.

July 14, 1848.

A vessel carried into a foreign port by a mutinous crew, with the master dispossessed and in irons, the expenses incurred by a party employed by the British vice-consul to investigate into the mutiny, and re-invest the master in his command, allowed by the court to be a good foundation for a bottomry transaction, although no mention was made of a bottomry bond in the outset of the inquiry, and the bond was taken from the master on the eve of the vessel's sailing from the port.<sup>2</sup>

THIS was a question as to the validity of a bond of bottomry upon this ship and her freight.

On behalf of the owners, it was alleged in the answer to the act on petition, that the vessel sailed from Liverpool for Mazatlan, on the west coast of Mexico, on or about the 14th of February, 1846, chartered by Messrs. Balleyall & Co., and consigned by them to F. Cooke, of Mazatlan, the partner or agent of the said Messrs. B. & Co. That the master was furnished with letters from the charterers to Victor Lenouvelle, a merchant at Sonsoneta, the agent of a firm at Guatemala, in correspondence with the charterers, and was also instructed that the said V. L. would furnish him with money for the ship's expenses free of commission. That in the course of the voyage the crew of The Gauntlet became insubordinate, and were \* encouraged by the first and second mates and car- [ \* 83 ] penter, and about six days before they arrived at Accajutla the crew, headed by the mate and carpenter mentioned, seized the master's person and placed him in irons and in close confinement. That they also at such time took forcible possession of the ship's papers, and removed from amongst them the ship's register and other papers. That they continued to keep the master in close confinement, and that on or about the 17th of July, 1846, The Gauntlet arrived off the port of Accajutla, with the said master still so confined. That before she had come to anchor, Louis Chappe, master of the brig Fifteen, came on board The Gauntlet, and having held a communication with the mutineers, without asking to see the said master, returned to the brig Fifteen. That on the following day he again returned on board The Gauntlet, accompanied by the commander of the port and a party of soldiers, and the said master, together with the whole

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<sup>1</sup> [S. C. 6 Notes of Cases 370. Reported again, *post*, p. 167.]

<sup>2</sup> [See *La Ysabel*, 1 Dod. 276, note.]

of the crew, except the cook, was then taken on shore under a military guard, and brought to the court-house before the authorities, by whom he was questioned as to the facts relating to the mutiny. That on his progress from his ship to the court-house, he was met by the said Victor Lenouvelle, who, having heard his statement, desired that the said master might not want for any thing, and declared his readiness to be answerable for any expenses he might incur. That the said master remained in close confinement under a military guard for five days, the crew being all on shore, and the ship in possession of a military guard, That during his confinement the said master wrote a letter to the commandant, requesting him to give notice that, as the

legal representative of the owner of The Gauntlet, he would  
[ \* 84 ] not be \* answerable for any debts which the crew might contract, and also requesting to be delivered up to the British authorities, and requesting the said commandant to forward a letter which he enclosed to the British consul at Guatemala. That there was not any British consular authority at Accajutla, nor any British mercantile house there. That subsequently to such application to the commandant of the port, the said master was informed that he could not be permitted to exercise any authority on board, or even to go on board The Gauntlet, except under a military guard, although for the purpose of obtaining some clothes and necessaries, which he did under such guard. That the crew remained under guard as prisoners ashore, and a guard of soldiers remained on board The Gauntlet; and it was repeatedly explained to the said master that he would not be allowed to exercise any authority whatever relative to the said Gauntlet until further orders. That the said master, having proceeded to the house of Victor Lenouvelle, remained there until the 30th of July, and during his residence there was informed by Mr. Makin that he was the agent of Mr. Cooke, and had come from Mazatlan on purpose to meet The Gauntlet, and that he was authorized and directed by Mr. Cooke to take charge of the affairs of The Gauntlet, and supply the master with money if necessary, and do whatever was needful in that behalf. That the said Makin also informed the said master that he had met the said J. W. Jeffries between Guatemala and Accajutla, and having fully informed him of his authority and instructions with respect to The Gauntlet, he was told by the said J. W. Jeffries, in answer to his communication, that he was going to inquire into the circumstances of the mutiny, and should take charge of the said ship, and would not permit

[ \* 85 ] either the \* said T. Makin or any other person to interfere in her concerns. That the said T. Makin, having protested against such intention, stated to the said J. W. Jeffries that he would

advance any money which might be necessary, and would do what was needful, but the said J. W. J. persisted in such his determination. That on the day after the communication with the said T. Makin, the master of the said Gauntlet went to Accajutla in company with the said T. M., and was informed by the commandant that he had received directions from the governor of St. Salvador to restore the vessel and reinstate the said master in the command of his ship, and also to find a crew, and allow the vessel to proceed on her voyage. That he thereupon went on board his ship, and recovered the ship's register, and prepared for his departure. That on or about the 3d of August, the said Chappe went to meet the said J. W. Jeffries, who was still on his way from Guatemala. That the said J. W. J. having arrived at Accajutla, represented to the authorities that he was commissioned by the British consul to investigate officially the recent occurrences on board The Gauntlet, and also delivered to the master of The Gauntlet a letter purporting to be from the British consul to that effect. That the said J. W. J. proceeded to take depositions on oath from the master and crew as to the mutiny at great length, and the investigation having lasted until the 13th of August, the said J. W. J. declared his opinion that the said master was free from all blame, and that the first and second mates and carpenter were guilty of mutiny. That the said master was taken ill and confined to his bed until the 18th of the said month of August, on which day the said J. W. J., for the first time, presented to the said master a great number of accounts in the Spanish \*language, [ \* 86 ] amounting in the whole to the sum of 7,324 dollars, or 1,615*l*. That the said master stated to the said J. W. J. that he did not understand the said accounts, being wholly ignorant of the Spanish language. That he denied his liability or that of his owners for any money received during his confinement and absence from his ship, and without his authority, advice, or knowledge. That the said master having applied to the commandant of the port upon the subject of the demand so made against him, was informed by the said commandant that unless he signed all papers whatsoever that might be presented to him for his signature, The Gauntlet should not leave the port. That he thereupon signed such accounts under protest. That he, the said Chappe, previous thereto, took the said master aside, and advised and urged him to sign the said bills, saying that the underwriters, and not the owners, would have to pay. That on the following day the said J. W. J. presented to the said master, for the first time, the bottomry bond in question, which the said master also signed under protest; and solely by reason that the said J. W. J. repeatedly threatened that The Gauntlet should not sail until he had

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signed the same. That the said master never did in fact take up or borrow from the said J. W. J. the sum of 1,615*l.*, or any sum for the purpose of defraying any necessary expenses whatever incurred by the said brig Gauntlet. That she only received provisions there for her voyage to the value of 67 dollars 1 real, 15*l.* 2*s.* sterling, or thereabouts, and no more.

On behalf of the bondholder it was pleaded in the reply, that when The Gauntlet arrived off Accajutla, P. L. Chappe, the master of the brig The Fifteen, the property of Messrs. Jeffries and Leek, [ \* 87 ] of Liverpool, merchants, \* and which was then at anchor in the bay, went off to her when at a considerable distance, and on boarding her was told by the mate that he was glad that he had come, as he had never brought a ship to anchor. That the said P. L. Chappe, having taken charge of the brig, with the assistance of his boat's crew brought her into the bay, and anchored her near his own brig, The Fifteen. That whilst so bringing her in, the said P. L. C., having discovered that a mutiny had taken place on board, and that the master and steward were below in irons, immediately upon the said vessel being safely moored went on shore and gave information of such mutiny to the authorities at Accajutla; and on the following morning the commandant of the port, attended by a sufficient force, and accompanied by the said P. L. C., the mate, and four of the crew of The Fifteen, went on board and demanded the ship's papers and register of the mate, who thereupon produced and gave up certain papers, but declared that he had never seen or knew any thing of her register. That the commandant then went ashore, taking with him the master and the entire crew of The Gauntlet with the exception of the cook, and leaving the vessel in charge of the mate and four seamen of The Fifteen and of some soldiers. That in consequence of the non-production of the register, The Gauntlet was held by the authorities of the place to be a piratical vessel, and, together with her cargo, liable to confiscation as such. That the said P. L. Chappe, considering it to be his duty so to do, immediately gave information by letter to the British consul-general in Central America of the difficulties in which the brig had been placed, and in consequence of such communication John Wilson Jeffries (the bondholder), at the request of the said consul, at great inconvenience to \* himself, proceeded from Guatemala to Accajutla, [ \* 88 ] a distance of about two hundred miles, to investigate the case, and take such steps as might be necessary to enable The Gauntlet to prosecute her voyage to Mazatlan. That the said J. W. Jeffries having on his journey touched at Sonsoneta, distant about twenty miles from Accajutla, communicated with Victor Lenouvelle,

the agent of Messrs. Klee, Skinner & Co., upon the subject of the said ship and her difficulties. That at such interview he, the said J. W. J., was strongly urged by the said V. L., to undertake, on account of the owners of the ship and her cargo, to discharge the costs and expenses incurred by her detention, but which he refused to do, and the payment thereof was then undertaken by the said V. L., but from which undertaking he afterwards withdrew, and signified his intention to the said J. W. J., in a letter which he addressed to him on the following day, the 4th August, 1846, and which the said J. W. J. received on his arrival at Accajutla. That previous to his entering upon the investigation of the affairs of The Gauntlet, the said J. W. J. was waited upon by the authorities of the place, who intimated to him that, unless he undertook for the payment of all dues, charges, and expenses already incurred, and what might subsequently be incurred by the said brig, she would be sold for payment of the same; whereupon the said J. W. J., on such repudiation of the said Victor Lenouvelle, and with the full knowledge and approval of Mr. Makin, who had previously arrived at Accajutla, consented to guarantee the payment of such expenses, thereby rendering himself personally responsible for the amount. That the said J. W. J., having thereby satisfied the demand of the authorities, forthwith commenced an \* investigation into the cause of the mutiny, [ \* 89 ] &c., and having been occupied therein for above a fortnight, and having come to the conclusion that no case had been made out against the master, and that the chief mate, second mate, and carpenter had been guilty of mutiny, he reinstated the former in the command of his vessel, and, placing the latter in irons, appointed other officers in their places, taken from the brig Fifteen, to discharge the duties of mate and second mate, and despatched The Gauntlet on her voyage to Mazatlan, sending therein Mr. Makin to protect the interests of the owners of the cargo. That the said T. Makin did not at any time upon his way to Accajutla, nor upon any occasion, inform the said J. W. Jeffries that he was directed to take charge of the affairs of The Gauntlet, and was ready to supply the master with money, if necessary. On the contrary, the said T. Makin, upon the sailing of The Gauntlet for Mazatlan, freely took charge of the bond of bottomry, together with the two bills of exchange drawn upon the said F. Cooke, at sight, on the said brig's arrival at Mazatlan, for the purpose of procuring for the said J. W. Jeffries the repayment of the money which he had so advanced on account of the said brig and her cargo. That after the original accounts forming the items for which the said bond was given (partly in the English and partly in the Spanish language) had been examined and signed by the master



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of the said brig, two copies thereof were made, one of which was delivered to the said master on the 13th of August, being the day previous to that on which the bond was executed. That the said master did not at such time make any remonstrance against the fairness of the said accounts, or protest against signing the said [ \* 90 ] bond, or in any way \* deny the liability of his owners for the liquidation of the same; or that he signed the said accounts in ignorance of the language in which they were drawn up, by reason of there being no one from whom he could obtain advice with respect to the same. That the said T. Makin was at Accajutla at the time when such accounts were delivered, and the said Victor Lenouvelle had been resident throughout the whole transaction at Sonsoneta, distant only about twenty miles, to both or either of whom the said master might have resorted for advice and assistance upon the subject of the said accounts, &c., had he felt any such to be necessary. That the said accounts and bond of bottomry were not signed by the said master at the instigation or urgent representation of P. S. Chappe; on the contrary, they were signed after having been carefully explained by J. W. Jeffries, in the presence of the said T. Makin, who cautioned him particularly not to sign any such documents unless he perfectly comprehended the meaning and effect of the same. That the said master signed the same without any objection; and in respect of one of them, namely, the bond of bottomry, himself voluntarily proposed that indorsement should be made on the ship's register in respect thereof as an additional security. That the charges and expenses in respect to which the bond was given were, under the peculiar circumstances in which the said brig was placed, moderate, and that without the aid and assistance of the said J. W. Jeffries the said brig would have been treated as a piratical vessel, and would, with the cargo on board her, have been condemned by the Salvador government, and thereby have been totally lost to the owners.

[ \* 91 ] \* The case was argued by *Addams* and *Robinson* for the bondholder.

*Harding* and *Bayford* for the owners of the ship.

\* JUDGMENT.

DR. LUSHINGTON. In this case the bond is admitted to have been executed by the master, but its validity is impunged upon the ground that there was no necessity for borrowing the money. The nature of the objection, therefore, which is taken to the bond, necessarily in-

volves a consideration of all the facts; and I regret to say, that, in order to arrive at a just conclusion, and to make the facts contained in the proceedings intelligible, it is indispensable that I should enter at considerable length into the circumstances of the case. [The learned judge having stated at length the substance of the pleadings as set forth above, observed to the following effect]:—Now, before I proceed to examine the evidence upon the controverted points in the case, I will just consider what are the facts which are admitted, and what is the legal inference to be deduced from them. The first important fact upon which all parties are agreed is, that when the ship put into Accajutla the crew were in a state of mutiny, and the master was dispossessed of his command, the crew alleging that he was in a state of lunacy. Under such a condition of things it is obvious that upon the arrival of the ship in the port of Accajutla, some investigation would naturally be made by the authorities of the place, in order to protect the property of the owners, and to restore the authority of the master. It is also, I think, equally apparent that some expenses would necessarily be incurred thereby, and that whoever defrayed those \* expenses, for the benefit of the owners, [ \* 92 ] would be justly entitled to a repayment. What is the next fact which is not controverted? It is this, namely, that the British government were in no way represented at Accajutla, and that the owners of the ship had no agent or correspondent there. It may be said that the owners, looking to the terms of the charter-party, considered that the charterers were bound to provide for all contingencies that might happen to the ship; and for any loss or injury they may sustain in the present instance from the default of the charterers in this respect, they may possibly have a remedy against the charterers for breach of covenant in the charter-party. Be this as it may, these are matters entirely foreign to the case; and they can in no manner affect the expenses incurred by the authorities of Accajutla, or the assistance rendered by Mr. Jeffries, if he was duly authorized by the British consul to interfere, and if his services were indispensably requisite. Having arrived at the conclusion, that some necessary expenses would be incurred on account of the ship upon her arrival at Accajutla, I entertain no doubt whatever, that such expenses, whether arising from the act of the authorities, or the misconduct of the crew, might become a legal foundation for a bond of bottomry, provided that the master had not the means of otherwise providing for them. The question then is, by whom were these expenses to be defrayed? The master, it is admitted, had no funds in hand, and had no credit to enable him to borrow upon his own personal security. The only persons to whom he could have applied to

advance the money on the credit of the charterers, were either Mr. Lenouvelle or Mr. Makin. Were these persons, according [ \* 93 ] to the evidence, ready \* to make such advances? Upon the 3d of August, I find Mr. Lenouvelle writing to Mr. Jeffries in the following terms:—"Sir, by a letter which I have received from Messrs. Klee, Skinner & Co., I am advised that the English consul has committed to you the management of the concerns of the English brig Gauntlet, and consequently I consider that you are empowered to pay all the charges that may be incurred for the victualing of the crew, the costs of the proceedings taken by the authorities at Accajutla, &c., &c. For my part, I have engaged to pay the tonnage dues, and maintain the seamen up to this date who were detained on shore by order of the commander of the port." So that, according to this letter, he was at this time only disposed to make advances to the limited extent of the expenses expressly specified. Upon the following day, the 4th of August, the inclination of Mr. Lenouvelle to advance his money on account of the ship appears to have undergone a still further modification; for on that day we find another letter addressed by him to Mr. Jeffries in these words:—"Sir, after having conferred with you last night respecting the charges for The Gauntlet, and after you had given me to understand that there would be no objection whatever to the payment of them, I see from the reply made by the English consul to Messrs. Klee, Skinner & Co., that the former is very far from approving of such charges, since he supposed them to be covered by the tonnage duty, which alone belongs to the government, and that they have nothing to do with those matters which do not relate to the revenue. This insecurity has led me to address myself to the board of customs and to the commandant of the port, to assure them that I am not responsible either for the tonnage duties or for the charges of the pro- [ \* 94 ] ceedings, \* military guard, interpreters, &c., and that I am only responsible for the maintenance of the seamen up to this time." From these letters it is clear that Mr. Lenouvelle, upon further consideration, was only ready to be responsible for the keep of the seamen from the time of the vessel's arrival up to the 4th of August, and no further. As far as the evidence goes, there is no satisfactory proof that he ever took the necessary steps to provide even for their limited portion of the expenses. Whether he did so or not, it is perfectly certain that the other expenses remained to be defrayed from some other quarter; and how far these remaining expenses were the subjects of a bottomry bond must be considered hereafter. Let us now see how the matter stands with respect to Mr. Makin. In the answer to the bondholder's act on petition, it is

distinctly averred, that, being authorized by Cooke to take charge of The Gauntlet's affairs, Mr. Makin informed Mr. Jeffries that he was prepared to advance any money that might be necessary, and do what was needful. This is a most important averment, and as a matter of course I have looked anxiously to the evidence to discover how far it is supported and borne out in proof. The only affirmative evidence in support of this averment, is the statement of the master in his affidavit, wherein he swears "that Makin told him that he had represented to Mr. Jeffries that he was willing to advance the necessary supplies." I may here observe, that this statement in the master's affidavit is widely different from the version which he himself gives in his protest. In that document I find him stating to the following effect: "that the agents for the charterers at Sonsoneta having refused to provide the said costs and expenses, and to enable the ship to leave Accajutla, \* he, the master, acting [ \* 95 ] to the best of his judgment and ability for the interest of all parties interested in the ship and cargo, did, under the extreme necessity of the case, execute the bond."

With such a startling discrepancy between his statement in the protest and in his affidavit, I cannot consider that the unsupported evidence of this witness is sufficient to satisfy my mind that Mr. Makin was in any degree prepared to supply the exigencies of this vessel; and I am more strongly induced to the contrary impression by the conduct of Mr. Makin himself in this transaction. What is the conduct of Mr. Makin in reference to this bond, upon the arrival of the vessel at Mazatlan? He transforms himself into the character of agent to Mr. Jeffries, and sues to recover the repayment of the bond in his behalf, thereby evidencing, in my judgment, not only that he never proffered his own money for the outlay, but that he approved of the bond and the proceedings had in relation thereto. With respect to the attempt which has been made by the owners of the vessel to supply the defectiveness of evidence upon this important point in the case, by the introduction of a draft affidavit, not sworn to by Mr. Makin, it is utterly impossible that such a document could be received as evidence in any cause, or in any court. If they ever were desirous of securing the testimony of Mr. Makin, they should have applied to the court to exercise the power given to it by the act of parliament, and I should willingly have put the act into execution to meet the exigency. Having omitted to do so, they must bear the consequence of their own remissness. Looking, then, to the evidence upon this part of the case, I do not hesitate in arriving at the conclusion that the bond is in no measure invalidated by any readiness on the part of Mr. Lenouvelle \* or of Mr. Makin to make the [ \* 96 ]

necessary advances. I must now advert to another ground upon which its validity has been denied, namely, that it was procured by compulsion, and that Mr. Jeffries took advantage of the distressed and helpless situation of the master, and that the bond was executed by him against his inclination and consent. As regards the latter averment, I would observe, that no bottomry-bond of the master, as an honest man, is a purely voluntary transaction, inasmuch that his distress and his necessities are the only grounds upon which he is justified in executing the bond at all. The true question, therefore, in the present instance, is, what sort of compulsion was exercised by Mr. Jeffries, in whose favor this bond was given? Looking to the facts of the case, I am of opinion that the circumstance of the vessel being in the possession and under the control of a mutinous crew when she arrived at the port of Accajutla, justified the authorities of that place in interfering as they did, and that all proper costs incurred by that interference were just charges against the ship. I am also further of opinion, that Mr. Jeffries was duly authorized to render his assistance, and that all proper expenses incurred thereby were legal charges against the ship; and this observation extends to any service which was rendered by Mr. Chappe and the crew of The Fifteen. The whole of the evidence in the cause satisfies my mind that there was no fund out of which these charges could be defrayed; and it was not reasonably to be expected that either the authorities of Accajutla or Mr. Jeffries would allow the ship to depart until such charges were paid, especially as the agent of the charterer,

Mr. Lenouvelle, had disclaimed all responsibility in reference to them. It cannot be denied that the authorities of

Accajutla and Mr. Jeffries had a legal right to detain the vessel until these charges were satisfied. As far, therefore, as the distressed and helpless situation of the master is concerned, I am clearly of opinion, that, although the possible detention of the vessel might operate as a compulsion upon him to sign and execute this bond, it was a legal compulsion. His only option, it is true, was either to sign the bond or leave his vessel under detention. He chose the former alternative, and in so doing, I think, acted for the benefit and advantage of all parties concerned in the ship, and the cargo which was on board. In the course of the argument it was pressed upon the court that when Mr. Jeffries first stepped forward to render his assistance, there was no express mention that he was to be reimbursed by a bond of bottomry. I do not think that this fact, under the peculiar circumstances of the case, can invalidate the subsequent bottomry transaction. It is very true that, upon general principles, where work has been done, or advances made upon personal security in the first

instance, the party doing the work, or making the advances, is not at liberty to turn round upon the owners, and cover himself by exacting a bond of bottomry from the master; but what is the case here? The expenses incurred by this vessel, and for which this bond was given, were incurred when the master was out of possession of the ship, and when he was incompetent to take charge of her, or to do any thing in her behalf. I now come to the last consideration in the case, namely, whether there is any thing in the nature and amount of the charges included in the bond which should affect its validity? Cases may occur, undoubtedly, in questions of this kind, where the character and \*extreme exorbitancy of the charges [ \* 98 ] might incline the court to pronounce against a bond as obviously concocted in fraud. Upon the face of this bond, I do not see any reason to impeach it upon either of these grounds. As regards the nature of the charges, there is nothing *primâ facie*, at least, which might not be legitimately included in a bottomry bond, and be the subject of a bottomry transaction; and as regards the amount, I see no reason to depart from the ordinary course of referring it to the registrar and merchants to investigate and decide upon the matter in the first instance.

It may be true that, with respect to a large amount of the charges, Mr. Jeffries is not only the creditor requiring payment, but has himself acted as judge in deciding upon the amount of remuneration due for the services of himself and his vessel The Fifteen. The effect of this circumstance, in my view of the matter, only renders it more expedient that an investigation should take place; it would not, I conceive, justify me in determining upon the amount without the assistance of the registrar and merchants.

Under all the circumstances of the case, I think I am bound to pronounce for the validity of the bond, but I shall refer the accounts to the registrar and merchants, to report thereon. In making this reference, I wish it to be understood that I do not propose to refer any question in the nature of a claim for salvage, but simply what is the amount of remuneration due to Mr. Jeffries *pro opere et labore*. With regard to the sum of 230*l.*, said to be the costs incurred at Mazatlan, I am of opinion that I cannot entertain such a claim. They are costs incurred not in this court, but within a foreign jurisdiction, and I have no authority to act in the matter at all. With \*respect to the costs of the proceedings in this court, I shall [ \* 99 ] reserve the question until the report of the registrar and merchants has been made.



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The Louisa. 3 W. Rob.

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THE LOUISA,<sup>1</sup> Motion.

November 3, 1848.

Where a fishing smack is actually taken off a lucrative employment in order to render a salvage service, the circumstance of her being so diverted from her occupation will form an essential ingredient in the salvage award. Where, however, she is not so engaged at the time, the award of the court will not be influenced by the consideration of the earnings she might have gained during her detention in the salvage service. Where salvage money has been paid into the registry for the purpose of distribution, the court has no power to decree from the fund in court the payment of advances made to the salvors by their agent.

In this case the vessel, having been abandoned by her crew, was found derelict off Lowestoft, and carried into Yarmouth Roads by the fishing smack The Anne, upon the 22d of May last.

The amount of salvage having been arranged by negotiation between the salvors and the owners of The Louisa, the sum of 269*l*. was paid into the registry, and the court was now moved to apportion the same amongst the owner, the master, and the crew of the fishing smack. An application was made on behalf of the owner of The Anne, praying that, in apportioning the salvage, the court would take into its consideration the circumstance that, during the negotiation of the salvage arrangement, The Anne had been detained at Yarmouth, and that she had by such detention lost the earnings of four days' fishing, amounting to a net loss of 20*l*. A further application was also made on behalf of Mr. Clark, that the judge would decree to him the repayment of certain advances which he had made to some of the salvors, whilst acting for them as their agent in negotiating the salvage remuneration.

## PER CURIAM.

The application of Mr. Clark, for the repayment of certain advances which he has made to the salvors, is, I believe, the second [ \* 100 ] application of the kind which \* has been made before me since I presided in this court. Upon the former occasion, I decided that I had no authority to direct such advances to be deducted from the general fund in the hands of the court, and I see no reason to depart from that opinion in the present instance. The claim of Mr. Clarke is for the payment of a debt contracted solely upon the personal security of the salvors. In allowing him to convert that

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<sup>1</sup> [S. C. 6 Notes of Cases, 531.]

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The Mary Caroline. 3 W. Rob.

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claim into a lien upon the property in the hands of the court, I should, I conceive, not only be exceeding my proper jurisdiction, but I should, in so doing, establish a precedent that might be productive of serious consequences hereafter, in encouraging advances of money that would be highly detrimental to the interest of the salvors themselves, particularly to the mates and seamen.

With respect to the application of the owner of The Anne, I do not think that the circumstance of the detention of his vessel, during the progress of the salvage negotiation, is entitled to much consideration under the circumstances of the case. If, as he alleges, he has been deprived of the employment of his vessel in her ordinary occupation of fishing, he has gained a salvage remuneration by the delay; and it was essential to his interest, as well as that of the master, mate, and seamen, that the salvage should be satisfactorily adjusted. It is also to be further noticed, that the smack was not actually engaged in fishing at the time when she first fell in with The Louisa. Where a fishing vessel has been actually called off from a lucrative employment, in order to render a salvage service, I have always considered that such a fact formed an essential ingredient in the estimate of the salvage award. In the absence of any such ingredient in this case, I think I shall do full justice to the master of The • Anne in awarding him the sum of 80*l*. The remaining [ \* 101 ] sum I apportion as follows:—60*l*. to the master, 40*l*. to • the mate, and the remainder amongst the four apprentices.

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THE MARY CAROLINE.<sup>1</sup>

November 3, 1848.

The value of a vessel condemned in a cause of damage by collision is the existing value of the vessel at the time or immediately prior to the collision. Claim of the owners of a damaging vessel to have their liability reduced to the value of their ship after the collision, overruled.

THIS was originally a cause of damage brought against this vessel by the owners of the late brig The Mary Isabella, which was sunk and lost by a collision which took place off the coast of Devonshire on the 27th of December, 1847. The case was heard upon the merits

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<sup>1</sup> [S. C. 6 Notes of Cases, 536.]

before Trinity Masters, upon the 19th of May last, and the court pronounced for the damage and the costs.

In the original action bail was given for the release of The Mary Caroline in the sum of 2,800*l.*, and the vessel was extensively repaired. Subsequent to the judgment, an appraisement was made of her value after the repairs, and a deduction of the costs of such repairs being made, it was ascertained that the real value of The Mary Caroline, after the collision had taken place, and before the repairs were commenced, did not exceed the sum of 1,294*l.*

A question was now raised, whether the owners of The Isabella were liable to the owners of The Mary Caroline for the value of the ship before the collision took place, or whether the liability was confined to her deteriorated value after the accident.

On behalf of the owners of The Mary Isabella, *Addams* and *Twiss* submitted, that prior to the statute 53, Geo. III, the owners [ \* 102 ] of \* a damaged vessel possessed, at common law and in this court, a right to compensation to the full extent of the damage they had sustained. That such right, it was true, had been modified and restricted by the provisions of the act of parliament, but such restriction being a limitation of a common law right, the act was to be construed strictly, and the words of the restricting clauses were not to be strained beyond their natural and obvious meaning. That the fair interpretation of the words in the act, "further than the value of the ship," was "further than her value at the moment before the two vessels came into collision." That the attempt to construe them otherwise, and confine them to the time when the collision had actually taken place, might, in many instances, lead to a total denial of all compensation to the owners of the vessel receiving the damage; as, for instance, in cases where the damaging vessel was herself sunk and lost. That such an interpretation was clearly never contemplated by the legislature in framing the act. That, as regards the decision of this court, the principle to be adopted in calculating the amount of damage to be received from the owners of a damaging vessel had been laid down by the court in the case of *The Gazelle*, and the decision in that case was in conformity with the view of the act for which the owners of The Mary Isabella were contending. That in the court of common law, the words themselves had received a judicial construction to the same effect. That such was the construction put upon the words of the act by the Court of Queen's Bench in the case of *Wilson v. Dixon* ;<sup>1</sup> and this construction had been further confirmed

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<sup>1</sup> [2 B. & Ald. 2.]

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The Mary Caroline. 3 W. Rob.

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by the decision of the Court of Exchequer in the case of *Brown v. Wilkinson*, 15 Mees. & W. p. 391; and of the Court of Chancery, \* in the case of *Dobree v. Schroeder*, 2 Mylne & Craig's [ \* 103 ] Rep. p. 489.

*Robinson and Bayford, contra.*

That the object of the act of parliament was to encourage and protect the shipowner by limiting his responsibility, and that the act was so far to be liberally construed as to give effect to this intention. That the words of the restricting clause were obviously inserted in accordance with this object, and it required no overstraining of their meaning to support the interpretation that the liability of the owners of a damaging vessel was to be measured by the price or value which his ship would have fetched if sold immediately after the damage had been committed. That supposing, in the present instance, the owners of The Mary Caroline, instead of repairing their vessel, and giving bail for her release, as they had done, had suffered her to be detained and sold under the process of the court in the condition in which she was after the collision, it could not for a moment be contended that the decree which has been pronounced in favor of The Mary Isabella would extend beyond the proceeds of the sale and the freight the ship might have earned at the time of the collision, together with the costs of the proceedings. That this point had been expressly determined by the court in the cases of *The Hope*,<sup>1</sup> and *The Volant*,<sup>2</sup> (Rob. vol. i.); and although in the present case bail had been given as for the value of 2,800*l.*, that circumstance would not affect the application of the principles laid down by the court in those cases to the present case, under the authority of Sir John Nichol, in the case of *The Neptune*, (3 Haggard.) That thirty-five years had elapsed since statute 33, Geo. III., was passed, and \* numerous cases had occurred [ \* 104 ] where wrong-doing vessels in causes of damage had been sold by the process of the court, and judgment by default had passed against the proceeds; yet, with the exception of the cases of *The Triune*, *The Hope*, and *The Volant*, no other cases were to be found in the reported decisions of the court in which the present question has been raised. That this fact supplied a tacit confirmation of the view of the statute contended for by the owners of The Mary Caroline upon the present occasion. That as regards the possible inconvenience which might arise from construing the act otherwise, in the case of the wrong-doing vessel being herself sunk, *non constat* the

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<sup>1</sup> [1 W. Rob. 265.]

<sup>2</sup> [1 W. Rob. 383.]

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The Mary Caroline. 3 W. Rob.

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owners of the vessel receiving the damage would be deprived of all compensation as suggested. That the *dicta* thrown out by this court in the decision of *The Volant*, and by Sir J. Parke, in his judgment in *Brown v. Wilkinson*, would lead to a contrary inference. That as regarded the cases cited from the common law reports, the cases of *Wilson v. Dixon*, and *Dobree v. Schroeder* were not strictly cases in point; the question in those cases being, not what was to be taken as the value of the ship, but in what mode that value was to be ascertained, whether by appraisement, or by taking the previous cost of the vessel and deducting for wear and tear; whatever, therefore, fell from the learned judges who decided those cases was to be considered as mere *obiter dicta*. That with respect to the case of *Brown v. Wilkinson*, the owners of the damaging vessel, instead of pleading the total loss of their ship, allowed judgment to go by default, which was expressly noticed by the court as admitting their liability to pay some damages.

[ \* 105 ]      \* JUDGMENT.

When this case was originally brought before the court, bail was given on behalf of the owners of this vessel in the sum of 2,800*l*. Since the decision of the original cause, it has been ascertained by appraisement (as it is stated), and deducting the cost of the repairs, that although before the collision the value of the ship was 2,894*l*., yet that her actual value, after the accident had taken place, was reduced to the sum of 1,294*l*. The question now arises, what are the legal principles by which the value of *The Mary Caroline* is to be ascertained? This is a question undoubtedly of great importance to the owners of *The Mary Isabella*, because that value will be the true measure of the compensation to which they will be entitled. With respect to the amount for which bail was given in the original cause, it is perfectly clear that this circumstance can in no degree affect the question now under consideration, inasmuch that the responsibility of the persons who have become bail only extends to the actual value of the property for which they have made themselves securities.<sup>1</sup> This point has been decided by Sir John Nicholl, in the case of *The Richmond*, reported in 3 Hag. Rep. p. 431, and I should be acting not only in opposition to the decision of Sir J. Nicholl in that case, but to the principles laid down by Lord Stowell in the case of *The Betsey*,<sup>2</sup> if I acceded to the argument that has been suggested from analogy to other cases where bail has been held responsible to the full extent of the security. Laying aside, therefore, any reference

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<sup>1</sup> [*The Mellona*, 3 W. Rob. 16.]

<sup>2</sup> [5 C. Rob. 295.]

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The Mary Caroline. 3 W. Rob.

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to the amount of the bail in this case, the question, it appears to me, entirely depends upon the construction of the statute 53 Geo. 3, c. 159. Prior to passing \* of that statute, the [ \* 106 ] ancient law, as I have already stated in former decisions, rendered the owners of vessels doing a damage responsible to the full extent of the damage which was committed, and this without reference to the value of the damaging vessel. In the courts of common law the plaintiff was entitled to a full indemnity for his loss; and in this court, I apprehend, if the suit had been brought against the owner *in personam* the same indemnification would have been awarded. By the statute of Geo. 3, a limit has now been put to the responsibility of the shipowners, and that responsibility is fixed at the value of their property in the damaging vessel. The question then, I repeat, is how, according to the limitation in the act of parliament, is the value of this vessel to be determined. Now in forming its construction of an act of parliament, the first thing that this court naturally looks to is, how far any previous construction has been deliberately put upon the act by the courts of common law. Where there has been a decision given in a court of common law in a carefully considered case, and that under circumstances not justly distinguishable from the case which this court is called upon to consider, the Court of Admiralty would be bound to follow the decision of the court of common law. Looking then to the reported decisions in the courts of common law, I find two cases which appear to me to have a very strong bearing upon the present question. The first and most important of these is the case of *Brown v. Wilkinson*, reported in the 15th volume of Meeson & Welsby, p. 391. In that case the vessel doing the damage was sunk at the time or immediately after the collision. The case was elaborately argued, and was very carefully considered by the Court of \* Exchequer, and Baron Parke, in [ \* 107 ] delivering the judgment of the court, expressed himself in these words. Alluding to the case of *Dixon v. Wilson*,<sup>1</sup> which had been decided in the Court of Queen's Bench, he says, "As the point has been decided in the case referred to, we should pause before we overruled that authority. It is not, however, necessary in this case to do so, for we think, that according to the true meaning of that decision, the value at the time of the loss, to which the damages were then restrained, is the value at the moment the loss commences by the collision with the defendant's ship, whence the injury; and it is not to be reduced by the consideration that the defendants' vessel is about to founder,

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<sup>1</sup> [2 B. & Ald. 2.]



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The Mary Caroline. 3 W. Rob.

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at which time it really is of no value, for that would be to exempt the defendants altogether, which the statute certainly does not contemplate under any circumstances." Comparing the facts of the case to which I have thus alluded with the circumstances of the present case, the only difference that I can discover between the two cases is, that in the case of *Brown v. Wilkinson* the vessel doing the damage was subsequently sunk, whereas in the present case *The Mary Caroline* has sustained a considerable amount of damage, and was considerably deteriorated in her value in consequence of the collision. As regards the construction of the statute, I do not apprehend that this constitutes any essential distinction between the two cases. The authority of the decision, therefore, in *Brown v. Wilkinson*, if it stood alone, would be sufficient to govern my decision in the present instance, unless it were opposed by authorities of equal or greater weight. After a careful examination of the decisions in the courts of common law, I am unable to discover any such authorities ;

[ \* 108 ] \* on the contrary, I find that in the Court of Queen's Bench, in the case of *Dixon v. Wilson*, (the cases alluded to by Mr. Baron Parke,) the learned judges of that court came to a similar conclusion, though by a different mode of reasoning. Mr. Justice Bayley, in delivering the judgment of the court, after commenting upon the words of the statute, concludes his observations in these words: "Upon the whole, therefore, it seems to me that the words 'the value of his or her vessel' must, unless there are some other words to control them, mean the existing value at the time when the loss takes place. The mode of ascertaining that value is a matter of evidence, and may possibly be attended with some difficulty." The construction thus put upon this statute by the courts of common law has been further confirmed by the present Lord Chancellor in the case of *Dobree v. Schroeder*, (2 Myl. & Craig's Rep. p. 489.) After citing the words used by Mr. Justice Bayley, Lord Cottenham proceeds to observe to this effect: "It is quite clear that it never occurred to Mr. Justice Bayley that there was any other mode than that of ascertaining the value of the ship at the time at which the loss or accident happened." It is said that these expressions are to be considered as mere *obita dicta*. It is clear, however, from the words of the judgment, it never entered into Lord Cottenham's mind to suppose that the party was relieved of responsibility by reason of the vessel being sunk. The only question with him was how to ascertain the value ; and, according to his opinion, it was the value at the time when the collision took place. Such being the result, not only of the common law authorities, but also of the High Court of

[ \* 109 ] Chancery, I consider myself concluded by \* them as regards

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The *Tecumseh*. 3 W. Rob.

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the present question. I have looked at the authorities cited by the learned counsel for *The Mary Caroline*, but I do not find in them any thing that conflicts with the decisions to which I have referred, I must, therefore, pronounce that the value of *The Mary Caroline* must be estimated at her value at the time or immediately preceding the collision.

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THE *TECUMSEH*.<sup>1</sup>

November 3, 1848.

Construction of the statute 7 & 8 Vict. c. 112. The right of the master to sue for his wages in the Court of Admiralty is not taken away by the circumstance that the owner, subsequent to the declaration of his insolvency, had compounded with his creditors and been released from his debts by the Lord Ordinary of Scotland.

THIS was a cause of subtraction of wages, brought by the master of the vessel under the provisions of the statute 7 & 8 Vict. 112.

An appearance under protest was given on behalf of the owner; and the jurisdiction of the court was denied, upon the ground that the owner of the ship was neither a bankrupt or insolvent, within the meaning of the act of parliament.

The question was argued in support of the protest by —

*Addams*.

*Bayford, contra*, on behalf of the master.

JUDGMENT.

The action in this case is promoted by James Ingleton, to recover the wages due to him as master of this vessel from the 2d of September, 1846, to the 26th of October, 1847. The suit is brought under the provisions of the statute 7 & 8 Vict. c. 112, s. 16; and it is alleged on behalf of the master, that having originally proceeded with the vessel in the capacity of mate, \* on a voyage [ \* 110 ] from this country to Moulmein in the East Indies, upon the 2d of September, 1846, he was appointed by the former master to succeed him in his command, and that he navigated the vessel as master

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<sup>1</sup> [S. C. 6 Notes of Cases, 533. Reported again, *post*, p. 144.]

in her homeward voyage, and brought her in safety to Newcastle, where she arrived on the 26th of October, 1847. The defence of Mr. Glasse, the owner, who appears to the action under protest, is grounded upon the averment that his property was sequestrated in Scotland in the month of August, 1846; and in the same month a declaration of his insolvency was inserted in the Edinburgh Gazette. That shortly afterwards he offered a composition to his creditors, which was accepted; and on the 30th of June, 1847, he was discharged from all the debts owing by him at the date of the sequestration; and this discharge was confirmed by the Lord Ordinary on the 1st of July, 1847, in pursuance of the statute 2 & 3 Vict. c. 41, s. 116. The question, then, which I have to determine is, whether at the time of the arrest of the vessel in this cause the previous bankruptcy of Mr. Glasse, in the month of August, 1846, gave to Mr. Ingleton the right of suing for his wages in this court, under the terms and according to the meaning of the act of parliament. The 16th section of the statute provides in these terms: — “That all the rights, liens, privileges, and remedies, save such remedies as are against a master himself, which, by this act, or any law, statute, custom, or usage, belong to any seaman or mariner, not being a master mariner, in respect to the recovery of his wages, shall, in case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships or master mariners.” From these words it is obvious that the legislature in framing the statute, intended, [ \* 111 ] \* in the case of the owner’s insolvency or bankruptcy, to put the master in the same position as an ordinary seaman, so far as regards his right to sue in this court for the recovery of his wages. It is also further obvious, looking to the facts of this case, that in the month of August, 1846, Mr. Glasse, the owner of this ship, was, by his own admission, a bankrupt and insolvent, and that the master, at that period of time, had a lien upon the vessel for his wages under the provisions of the act of parliament. How far, then, was this lien taken away by what occurred in the month of June, 1847? It is said that, by virtue of the composition with his creditors, Mr. Glasse was in that month discharged from all debts owing by him at the date of the sequestration, and that he was reinvested in his estates under the 116th section of the statute 2 & 3 Vict. c. 41. Assuming that the owner was discharged from his debts as stated, I cannot but think that the master of this vessel still retained a lien upon the ship and a right to enforce the payment of his wages by proceedings against him in this court, under the 7 & 8 Vict., and for these reasons, — 1st. Because the deliverance of Mr. Glasse was, I apprehend, a deliverance only from the debts owing by him at the

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The Bagnall. 3 W. Rob.

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time of the sequestration, whereas the claim of Mr. Ingleton is in the nature of an after-accruing debt; and, 2ndly, because I conceive that the deliverance was still further confined to the personal obligations of the insolvent, and the claim in the present instance is a claim against the property itself. When the statute speaks of the bankrupt being re-invested in his estate, it must, in my construction of it, be understood to mean a re-investment of the bankrupt in his property, subject to prior liens outstanding upon it. What would be the consequence of any other \* construction? It would lead [ \* 112 ] to this: that although, at the time of the re-investment, there might be various outstanding liens, the bankrupt was not only to be put into possession of his property, but all the securities existing by law against that property were to be extinguished and annihilated: Such a construction would be monstrous in the extreme, and as regards the particular property involved in this discussion, namely, the property in the ship, would at once extinguish all claims, whether of bottomry, seamen's wages, or any others, and it is, I think, clear that the legislature could never have contemplated any such intention. It appears to me, therefore, that the right of Mr. Ingleton to sue for his wages is not taken away under the circumstances of the case, and I must overrule the protest. In so doing, I wish it to be understood that I pronounce no opinion upon the amount of wages that may be due, and certainly not with respect to any claim Mr. Ingleton may have for his services whilst on board the vessel in the capacity of mate; the question here is confined entirely to his claim in the character of master.

Protest overruled.

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THE BAGNALL,<sup>1</sup> Pearson.

*Motion.*

November 3, 1848.

Construction of the stat. 9 & 10 Vict. ss. 19 and 23. The Court of Admiralty has no jurisdiction to enforce a bond given to the receiver of droits for the release of a vessel from his custody under the provision of the 19th section.

In this case The Bagnall, whilst on her voyage from Boston in Lincolnshire to the port of London, struck upon the Gunfleet Sand

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<sup>1</sup> [S. C. 6 Notes of Cases, 542.]

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The Bagnall. 3 W. Rob.

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upon the 2d of February last, and having been got off by the assistance of H. M. cruiser, The Ranger, and two fishing smacks, [ \* 113 ] was taken by them into Harwich, and on \* their application detained by the receiver of droits under the provisions of the stat. 9 & 10 Vict. c. 99.

A bond, with two sureties, being given by the owners of the ship on behalf of the ship, freight, and cargo, the vessel and cargo were released; and upon the 8th of February, 1848, a suit for salvage was entered in the Court of Admiralty against the ship, freight, and cargo, the cargo not having been arrested, and no appearance being given for the owners. Upon the 19th of May, 1848, the cause was heard upon the merits, and the judge awarded the sum of 180*l.* for salvage for the ship, freight, and cargo, (the admitted value of the same being 1,575*l.*), and condemned the owners of the ship in the sum of 41*l.* 3*s.* (being their proportion of the salvage award according to the admitted value of the ship and freight,) and the costs of suit.

A motion was now made on behalf of the salvors to enforce against the sureties the payment of the balance of the salvage award due by the owners of the cargo.

An appearance was given under protest by the bail, and the motion was opposed on their behalf by —

*Addams and Twiss.*

*Bayford and Deane, contra.*

PER CURIAM.

This was originally a cause of salvage, brought by Captain Saxby and the officers and crews of two smacks, The Trial and The Ranger, against this ship, her cargo and freight. An appearance was given to the action on behalf of the owners of the ship and freight [ \* 114 ] only; and on the 19th of May last, the cause \* was heard on the merits, and I awarded the sum of 180*l.* as salvage for the ship and cargo, and condemned the owners of the ship in the sum of 41*l.* 3*s.* (such being the admitted value of the ship and freight,) with the costs of the proceedings, leaving the question as to the cargo entirely untouched. Subsequent to this decision, Mr. Tatham, the proctor for the salvors, brought in an affidavit of Mr. Lindsay, with a bail bond taken by the receiver of droits at Harwich, and at his petition a monition was decreed against Mr. Bagnall, the owner of the ship, and Mr. George, his agent, who had signed the bond, calling upon them to show cause why the said bond should not be enforced

against them, so far as regards the payment of the proportion of salvage still due upon the cargo. Mr. Clarkson has now appeared for Mr. Bagnall and Mr. George; and it has been argued on their behalf, that the bond is a mere nullity and cannot be enforced against them by the authority of this court under the circumstances in which it was given. The point, therefore, which I have to determine is, whether, having signed the bond, they are or are not amenable to the jurisdiction of the court with respect to the fulfilment of the conditions contained in it. The bond, it appears, was given under the following circumstances: The ship had been brought to Harwich by the salvors, and no arrangement having been made with the owners respecting the amount of remuneration, and the vessel, according to the salvor's statement, being about to leave Harwich, application was made to the receiver of droits to detain the vessel under the provisions of the statute 9 & 10 Vict. c. 99, until a salvage remuneration should be paid, or until security should be given for the same. The receiver of \*droits in compliance with this appli- [ \* 115 ] cation, having required that a bond should be given, the bond which is now in question was signed by Messrs. Bagnall and George. It stipulates to the following effect: "That J. B. and F. G. produce themselves as sureties for the master and owners of the ship and cargo, and submitting themselves to the jurisdiction of the High court of Admiralty, bind themselves, their heirs, executors, and administrators, in the sum of 600*l.* to answer the salvage and the expenses of the said ship and cargo, according to the tenor of the act in that behalf made and provided; and in default of their so doing, they further consent that execution shall issue against their goods and chattels wheresoever the same shall be found."

Such is the tenor of the bond; and the question is whether, upon the face of it, it can be enforced in the Court of Admiralty. Looking to the terms in which it is drawn up, it is to be observed in the first place, that it is given on behalf of the owners of the ship and of the cargo, and that the bail profess to submit themselves to the jurisdiction of this court, so far as concerns the liability of both ship and cargo, to answer the salvage and the expenses of the proceedings which have taken place. It is also to be further noticed, that by the form of the bond more is stipulated to be done than can be compulsorily carried into effect by the ordinary process of the court; because, under the circumstances of the case, it is impossible that I can order execution to issue against the goods and chattels of Mr. Bagnall and Mr. George in respect to the salvage of the cargo, neither of those persons being the owner of the same nor having any interest therein. The jurisdiction of this court over bonds in general has, I ap-



[ \*116 ] prehend, been heretofore confined to bonds \* of bottomry and bonds which have been taken by the court itself, and it is abundantly clear to my mind that if this bond had been a purely voluntary transaction between the respective parties, without any intervention at all on the part of the receiver of droits, it could not be enforced in this court however valid it might be elsewhere, or however liable to be sued upon in courts of another jurisdiction. Does then the circumstance of its having been taken by the receiver of droits under the alleged provision of the statute empower me to enforce it in the present instance? The solution of this point must depend upon the construction of the act of parliament, and to that I must now refer. Looking at the statute itself, there are, it appears to me, only two sections which can have any bearing upon the matter at issue in this case, namely, the 19th and 23d sections. My attention has been directed to these sections by the learned counsel in the course of the argument, and I certainly concur in the observation, that the 23d section has no bearing upon the question beyond the fact that in the case mentioned therein, where a bond is to be taken, the form of the bond is expressly pointed out and referred to in the schedule (A.), whereas in the 19th section there is no reference to any form of bond whatever. The real difficulty of the case is, what is the construction of the 19th section? Having directed, in the earlier portions of it, that a reasonable reward shall be paid to the salvors within a given time, it goes on to provide in the following somewhat ambiguous words, — that, “in default thereof,” that is, the payment of a reasonable reward, “the said ship or vessel, or any part of the cargo remaining on board thereof, so saved as aforesaid, shall remain in the custody of the High Court of Admiralty, and

[ \*117 ] the \* said goods or other articles (and also until warrant issued by the High Court of Admiralty the said ship and cargo) shall remain in the custody of the receiver or officer of the customs until the person so acting or employed in the preservation of such ship or vessel, goods or other articles as aforesaid, shall have been reasonably compensated for his said assistance and trouble, or reasonable security given for that purpose to the satisfaction of the said receiver or officer of the customs or High Court of Admiralty.” The 19th section of the statute, as it is thus worded, is undoubtedly most awkwardly drawn up in using the expression, “shall remain in the custody of the High Court of Admiralty,” because there is no mention of the vessel having been previously arrested by a warrant of this court, nor is there any allusion to the mode by which it got into the custody of the Court of Admiralty at all. There can be no doubt, that if once in the custody of the court, it would be detained,

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The Lady Flora Hastings. 3 W. Rob.

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“and it was therefore unnecessary to say that if a salvage award was not paid, and the ship was in the custody of the High Court of Admiralty, it should remain till a salvage remuneration was paid or reasonable security given for the payment of the same.” Again, it is said the ship or vessel, goods, or other articles, until warrant issued from the High Court of Admiralty, shall remain in the custody of the receiver or officer of the customs until the salvage be paid or security be given. The meaning of this is plain enough, namely, that if the authority of the Court of Admiralty has not been exercised, and the receiver is in possession of the ship and cargo, it shall remain in his custody, or in that of an officer of the customs, till compensation is made or security given to the satisfaction of such receiver, or officer of the customs, \*or High Court of Admiralty. [\*118] Now, in this case the bond has been taken without any reference to the Court of Admiralty at all. It may be a bond to the satisfaction of the receiver; but can it be considered a bond to satisfy this court without the interference of the court being at any time exercised in the matter? Certainly not. The real mode of construing this part of the 19th section, it appears to me must obviously be as follows: namely, that where the vessel, or cargo, or goods remain in the custody of the receiver, or any officer of the customs, the security must be to his satisfaction; when it is in the possession of the Court of Admiralty, the security must be according to the usual course of proceeding here. Having arrived at the conclusion with respect to the statute in question, I am of opinion that I have no authority to enforce this bond, and that the parties who have signed it are entitled to be dismissed with the costs of these proceedings.

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THE LADY FLORA HASTINGS.<sup>1</sup>

November 3, 1848.

Where an agreement has been made with a steam-tug belonging to a steam-tug towing company to tow a vessel from Dover to Gravesend for 40*l.*, and the steam-tug breaking down in the progress of the service, the towage was completed by other steam-tugs belonging to the same company, the defence of the owners of the vessel in tow, that the contract was annulled by the non-fulfilment of the original agreement, not sustained. *Seemle*, the acceptance of the services of the other steam-tugs by the master of the vessel in tow, a continuance of the original contract.

THIS was a suit promoted by the Caledonian Steam Towing Com-

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<sup>1</sup> [S. C. 6 Notes of Cases, 550.]

pany for the recovery of the sums of 12*l.* and 40*l.*, alleged to be due for towage services rendered to this vessel.

The act on petition in substance alleged — That on the 23d April, 1848, The Lady Flora Hastings having been observed near Dover by the crew of The Robert Bruce steam-tug proceeding up channel under double-reefed topsails, and having lost her jib-boom,

[ \* 119 ] a verbal agreement was made between the master of \* The

Flora Hastings and the master of The Robert Bruce, that the tug should tow the bark to Gravesend for 40*l.* That when near the east buoy of Margate Sand, the ebb tide having set against them, the bark was brought up for the night, and the lever of one of her engines breaking, the steam-tug ran into Broadstairs; and on the following morning, having disconnected her engines, and having brought the power of the uninjured engine to bear upon both paddle-wheels, she again took the bark in tow, and towed her to Girdler Hole, where, with the consent of the master and pilot, she left her in a safe position, and proceeded to Gravesend to procure another of the companies' steamers to complete the engagement. That on the following morning The Souter Johnnie was sent for that purpose, and towed the bark to Gravesend; and upon her arrival there a fresh engagement was made with the masters of The Souter Johnnie and The Robert Burns, two steam-tugs belonging to the Caledonian Steam-Tug Company, to tow the bark to the West India docks for 12*l.* which was done. A tender of 12*l.* was made in acts of court, and the payment of the 40*l.* was resisted upon the ground that the master of The Robert Bruce had misrepresented his steam-tug as of 120 horse-power, and efficient for the service of towing the bark to Gravesend, whereas, for want of sufficient power, the engines broke down, and the bark was obliged to be brought up off the North Foreland for the night; and that on the following day she was left by the tug in a dangerous position near the Girdler buoy, whilst the tug, without the consent of the master or the pilot, went to Gravesend to procure adequate assistance. That the arrival of The

[ \* 120 ] Flora Hastings at the docks was delayed in \* consequence, and another bark, the New York packet, which was beating through the Gull Stream when The Lady Flora Hastings passed in tow of the steamer, arrived at the docks twenty-eight hours before her.

The case was argued on behalf the Steam Towing Company by

*Queen's Advocate and Jenner.*

*Addams and Twiss, contra.*

## JUDGMENT.

DR. LUSHINGTON. This suit is brought by the Caledonian Steam-Tug Company to recover two separate sums of 40*l.* and 12*l.*, which it is alleged were contracted to be paid by the master of The Flora Hastings for towing his vessel from off Dover to the West India docks. A tender of 12*l.* has been made, and the payment of the further sum of 40*l.* is resisted on the ground that the contract in question was not properly fulfilled. It is, therefore, necessary that I should shortly examine into the circumstances of the case, for the purpose of ascertaining whether or no the contract has been broken and the payment is justly refused. The vessel it appears was proceeding on a voyage from New Orleans to the port of London, and on the 23d of April last, she arrived off Dover, when the master, in order to save time, engaged with the master of The Robert Bruce to tow her up to Gravesend for the sum of 40*l.* On arriving at the North Foreland one of the engines of the steam-tug gave way, and The Flora Hastings was in consequence brought up for the night, and the master of the steam-tug proceeded to Broadstairs to remedy the damage she had sustained. Whether he so quitted the bark with \* the consent of the master it is immaterial to [ \* 121 ] consider, because it is clear that the master of The Flora Hastings, at all events, did not express any objection, and was not unwilling to renew the employment of the steam-tug upon her return to the bark. On the following morning The Flora Hastings was again taken in tow, and on arriving at Girdler's Hole was again brought up, and the steamer having proceeded to Gravesend to procure further assistance, the bark was subsequently towed to Gravesend by The Robert Burns, and from thence to London by The Robert Burns and Souter Johnnie under a fresh agreement for the sum of 12*l.* Such are the facts of the case, and the defence is rested upon the grounds — First, that the original agreement between the master of The Flora Hastings and the master of The Robert Bruce has not been fulfilled, by reason of the inefficiency of the steam-tug, and that another vessel arrived at the docks with much greater expedition. Secondly, that the machinery of the steamer was defective, and broke down when off the North Foreland. With respect to the first defence, I cannot satisfy myself upon the evidence before me that The Robert Bruce was so far inefficient as to be unable to fulfil the duty of towing a vessel of the burden only of six hundred tons; and I certainly should not be disposed to test the inefficiency by so uncertain a criterion as the fact that another vessel performed the same distance with much greater expedition than The Flora Hastings. I am, therefore, bound to say, that in my judgment the contract was not unful-

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The Cape Packet. 3 W. Rob.

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filled by reason of the general inefficiency of the steamer. In respect to the breaking of the lever of one of the engines when off the North Foreland, I am of opinion that if Mr. M'Farlane, the captain [ \* 122 ] of The Flora Hastings, had \* thought fit to discharge The Robert Bruce and employ another steamer at the moment when the accident occurred, it was competent for him to have done so, and to have put an end to the agreement, although the delay was occasioned by a contingency which was purely accidental, and which no precaution could have provided against. Mr. M'Farlane, however, adopted a different course; and in subsequently availing himself of the services of the steam-tug on the following morning he, in my opinion, completely waived any breach of contract, and has debarred the owners from making use of it as a ground of defence in the present instance. The same observation will apply to what took place upon the arrival of the vessel at Girdler's Hole. Then, again, the master might have availed himself of the breach of the original agreement; but he acted as if the contract was a still subsisting contract, and it cannot, I think, be doubted that the subsequent services of the two other steamers were accepted as substitutes for the other vessel, and in pursuance of the original agreement. I am, therefore, of opinion that if there has been a breach of the original contract in this case, the master has not availed himself of the legal opportunity to annul it, and that I am bound to pronounce in favor of the Caledonian Steam Towing Company, that the whole of the towage which is claimed on their behalf must be paid.

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### THE CAPE PACKET.<sup>1</sup>

November 14, 1848.

Claim for salvage partially disallowed, upon the ground the salvors, in the performance of the salvage service, had displayed great want of skill, and had brought the vessel into danger and difficulty thereby. *Semble*, the deduction in the amount of the salvage award is to be measured, not by the amount of damage sustained, but in proportion to the *quantum* of negligence or ignorance displayed by the salvors.<sup>2</sup>

THIS was a cause of salvage, promoted by the owners and crew of

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<sup>1</sup> [S. C. 6 Notes of Cases, 565.]

<sup>2</sup> [As to forfeiture or diminution of salvage by misconduct of salvors, see *The Joseph Harvey*, 1 C. Rob. 206; *The Duke of Manchester*, 2 W. Rob. 470.]

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The Cape Packet. 3 W. Rob.

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the fishing smack *The Rose*, and the owners and crew of the pilot cutter *The \* Surprise*, for services rendered upon [ \* 123 ] the 2d March last.

The *Cape Packet*, it was pleaded, sailed from London in the month of February, on a voyage to St. Helena, and, having encountered tempestuous weather, suffered considerable damage, and had lost nine of her crew, who were swept overboard, when, upon the 2d of March last, she was met with off Plymouth, and, at the request of the master, taken in charge by the master and crew of *The Rose*, who undertook to carry her into Dartmouth. In making for that harbor, *The Cape Packet* was steered to the northward of the Eastern Blackstone Rock, and, on attempting to pass between the rock and the main land, struck the rock, and, beating violently, was damaged to the extent of 500*l*.

This fact was pressed by the owners of *The Cape Packet*, and the defence to the suit was rested upon the averment that, in the disabled state of the vessel, the attempt to take her between the rock and main land was such gross negligence and unskilfulness as entailed a forfeiture of the salvage reward.

The question was argued before *Trinity Masters* by

*Harding* and *Bayford*, for the salvors.

*Jenner* and *R. Phillimore*, *contra*.

#### JUDGMENT.

DR. LUSHINGTON. Gentlemen, — It cannot be denied that, *primâ facie*, considerable merit is to be ascribed to the salvors, in taking charge of this vessel and conducting her into port, when we look to the great diminution of her crew, and the damage she had previously suffered \*from the stormy state of the weather. [ \* 124 ] From the combination of these causes, it was clearly essential that she should be carried without delay into some port, and whether Plymouth, or Dartmouth, or some port further up the channel, was the more convenient for the purpose, must depend upon circumstances which you will be best enabled to estimate. The statement of the salvors is, that, upon the morning of the 5th of March, the vessel, in consequence of a change of wind, had got to the eastward of the port of Dartmouth, and that they determined, in consequence, to make for that port. Upon the propriety or impropriety of this determination, I cannot take upon myself to decide. It is, however, to be observed, that the expediency of the measure does not appear, upon the face of these proceedings, to have been in any man-



ner called in question by the master of The Cape Packet. It further appears that, in making for Dartmouth, The Cape Packet was conducted between the Eastern Blackstone and the Mewstone; and here, gentlemen, the two following questions arise:—1st, By whose advice was she so conducted? and, 2d, Was the measure a prudent measure, and proper to be adopted under the circumstances of the case? Upon the first point, I think we must clearly consider that the measure was suggested and advised by the salvors themselves; because it is alleged, in their own act on petition, that the charge of The Cape Packet had been given up to them by the master. Taking, therefore, to themselves credit for having the charge of the vessel committed to them, they must, I think, also bear the responsibility attaching to it.

With respect to the second question, which, in truth, forms the real issue in this case, I must depend entirely upon your opinion [ \* 125 ] in the present instance, as \* it would be utterly impossible for me to form a correct judgment as to the proper mode of entering the port of Dartmouth, and still more so as to what was proper to be done under the circumstances of the case, both in reference to the state of the weather and the condition of the ship. Gentlemen, before I propose the question which I intend to put to you, I would shortly direct your attention to the principle which governs the court's proceedings in questions of this kind. The principle is this:—That when persons undertake to perform a salvage service, they are bound to exercise ordinary skill and ordinary prudence in the execution of the duty which they take upon themselves to perform. I do not mean to say that they must be finished navigators; but they must possess and exercise such a degree of prudence and skill as persons in their condition ordinarily do possess, and may fairly be expected to display. I need scarcely point out to you, that, where the neglect or the misconduct is wilful, it entails an entire forfeiture of the whole claim to salvage remuneration. This is not attributed to the salvors upon the present occasion. There may again be instances of such gross negligence, independent of any wilful inattention, as would debar all claim for salvage recompense. Such was the case of the Lockwoods, which was cited in the argument by one of the counsel for the owners. There is also another kind of negligence, the effect of which is to diminish the amount of salvage reward, not to take it entirely away. The extent of this diminution, I may further state, is not measured by the amount of loss or injury sustained, but is framed upon the principle of proportioning the diminution to the degree of negligence, not to the consequences.

[ \* 126 ] Gentlemen,—Having thus stated to you the \* principle

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upon which the court acts in this class of cases, I shall now submit to your consideration the two following questions:—

My first question I shall frame in this shape, namely—Is it consistent, generally speaking, with good seamanship to conduct a vessel of 350 tons burden between the Eastern Blackstone and the Mewstone?

My second question is—Assuming it to be imprudent so to conduct a ship under ordinary circumstances, do the particular facts of this case so far work an exception in the salvors' favor as to justify them in having made the attempt upon the present occasion? To this latter question I must request your particular attention, because it forms the real issue in the cause. The owners of The Cape Packet rest their resistance to the salvors' claim upon the averment that the measure was utterly unjustifiable. The salvors, on the other hand, defend themselves upon the express ground that the measure was rendered necessary by the state of the wind and weather, and the condition of the vessel. They allege in their pleadings to this effect, "that the bark had been running for Dartmouth harbor with a southerly wind, until the night came on, accompanied with thick and dirty weather, when she lay to off the mouth of the harbor, with a flood tide, which carried her to the eastward; and being in the morning off Down End, and well in under land, and the wind having changed to N. right off the land, it was highly desirable, in consequence of the bark being so much then to windward, to endeavor to keep there; and, in order to do so, it was necessary to go inside the Blackstone Rock." In another part of their plea they further allege, "that the disabled state of the bark, she having no after-cannass to enable her to stay, made it still more necessary for her, [ \* 127 ] under the circumstances, if possible, to keep her position to windward; that it was a matter of great urgency to get her speedily into port." The whole case of the salvors, therefore, in answer to the charge which is made against them, is, that, looking to the wind and the disabled state of the ship, it was absolutely necessary to get her into port as soon as possible; and that although, generally speaking, the passage between the Eastern Blackstone and the Mewstone is not, perhaps, a desirable course, nor altogether unattended with risk, yet that, under the circumstances of the case, it was expedient to encounter such risk, in preference to the possible contingency of undergoing still greater danger. How far this is or is not a satisfactory explanation of their conduct, it must now rest with you, gentlemen, to determine.

*Trinity Masters.* We are of opinion that the salvors were not jus-

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The Thomas Worthington. 3 W. Rob.

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tified in risking a disabled vessel, by conducting it between the Eastern Blackstone and the Mewstone.

PER CURIAM.

Having considered in my own mind what I should have awarded in this case if there had been no misconduct on the part of the salvors, and having made what I consider a proper deduction therefrom in proportion to that misconduct, I shall award the sum of 600*l.* only.<sup>1</sup>



[ \* 128 ]

\* THE THOMAS WORTHINGTON.<sup>1</sup>

November 22, 1848.

Mere error of judgment on the part of the master, in the management of the concerns of a vessel in a foreign port, unaccompanied by corrupt intention or wilful disobedience of orders, will not, *per se*, entail a forfeiture of his wages. Defence of the owners, that the wages were forfeited by reason of alleged losses sustained by them in consequence thereof, overruled.

THIS was a question as to the admissibility of a responsive allegation in a suit for wages. The suit was brought by the master under the stat. 7 & 8 Victoria, the owners being bankrupts; and a libel having been admitted on behalf of the master, a responsive allegation, consisting of nine articles, was now offered on the part of the trade and official assignees.

The allegation pleaded, —

1st. That on the 9th of September, 1847, The Thomas Worthington was despatched by the owners on a voyage from Liverpool to Bahia, with a cargo of coals; that, on the sailing of the ship, the owners addressed to Messrs. Lyon & Benn, their agents at Bahia, a letter to the following effect: —

“Dear Sirs, — We enclose you a few lines. We write you per Shamrock, which sailed from London on the 26th instant. The bearer is now ready for sea, and will sail on Monday morning for your port with 250 tons of coals, for which you have bill of lading enclosed, and you will please dispose of them to the best advantage for our account. We intended the bearer merely to call off your port with the view of Rio de Janeiro being her ultimate destination, but she will now go direct to your port, and you will please to load her

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<sup>1</sup> The value of the ship was 6,775*l.*

<sup>2</sup> [S. C. 6 Notes of Cases, 570.]

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The Thomas Worthington. 3 W. Rob.

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home on our account with a cargo of fair average brown sugars, which we doubt not you will be able to ship at a very moderate figure, owing to the very dull accounts that have been going from this side, and we leave you to carry out the operation for us as quietly as possible, letting the vessel call at Cork for orders." That such letter was delivered to S. R., the master, who was fully informed of the contents thereof, and was by him delivered \* to [ \* 129 ] Messrs. L. & B. on the arrival of the vessel at Bahia; that a copy of such letter was, according to the custom of the house of trade of the owners in Liverpool, retained by them in their letter-book, and that such letter-book, with the copy of the said letter, will be produced, if required, at the hearing of the cause.

2d. That on the sailing of the vessel from Liverpool, Messrs. S. & B., the owners, gave verbal instructions to the master, and also wrote and sent him a letter, directing him to proceed on his voyage to Bahia, and to pay every attention to his vessel, and in all respects to keep in view the interest of her owners. That such letter is in the custody of the said master, &c. &c.

3d. That The Thomas Worthington arrived in the port of Bahia on the 15th of November, 1847, and pursuant to their aforesaid instructions, Messrs. L. & B. sold and disposed of the cargo of coals laden on board thereof, and shortly afterwards, to wit, on or about the 1st December, 1847, received information that the firm of B. J. & H., the owners of the vessel, had been obliged for a time to suspend their payments. That thereupon the said Messrs. L. & B., being creditors to a large amount of the said firm, determined not to execute their order to load the ship home to the port of Liverpool with a cargo of sugar. That the master, in direct contravention to the orders of Messrs. B. J. & H., and omitting to keep in view the interest of his owners, executed a charter-party, bearing date at Bahia, the 30th of November, 1847, whereby it was agreed that the ship should load a cargo of sugar to proceed to a port on the continent of Europe or Great Britain, at certain rates of freight therein set forth, and whereby it was \* expressly stipulated that the freight should [ \* 130 ] be paid on unloading and right delivery of the cargo according to the custom of the port. That Messrs. B. & Co., of Bahia, merchants, the charterers of the ship, thereupon, to wit, on the 17th of December, 1847, shipped on board a cargo of sugar, and took a bill of lading for the same, wherein it was stated that the said cargo was to be delivered to Messrs. Merthe & Co., of Hamburg, merchants, or their assignees, on payment for the said goods at the rates mentioned and set forth in the charter-party, &c., &c.

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The Thomas Worthington. 3 W. Rob.

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4th. That, notwithstanding the agreement that the freight on the said voyage should be paid on the unloading and right delivery of the cargo, the said J. R., the master, in anticipation of the voyage, and whilst in the port of Bahia, demanded from Messrs. B. & Co., the charterers, the sum of 600*l.* on account of the aforesaid freight, which sum was accordingly paid by them to the said J. R., for which he gave a receipt to the said Messrs. B. & Co., therein stating that the same was on account of such freight, and that such sum was afterwards paid over by the master to Messrs. L. & B. without any authority from his owners.

5th. Pleaded, in supply of proof of the preceding articles, certain exhibits, being letters from Messrs. L. & B. to the owners, and the statements of the ship's disbursements and just charges.

6th. That Messrs. B. J. & H., the owners, were declared bankrupts on the 13th of November, 1847, and subsequent thereto, to wit, on the 18th December, the said ship sailed from Bahia and arrived in the port of Hamburg on or about the 11th of February, 1848, when the cargo was delivered, and the freight became due and payable according to the terms of the charter-party, and that the same ought to have been paid over to the assignees.

That on or about the 5th of February, 1848, the said assignees applied to the master for a copy of the charter-party, and that thereupon the said master wrote a letter to the said assignees, and enclosed therein such charter-party, together with a copy of the bill of lading.

7th. Pleads, in supply of proof, certain exhibits marked 5, 6, and 7.

8th. That the said master has forfeited all claim to wages by his neglect, as hereinbefore pleaded, of his duty to the owners of the ship, and not by disobeying those orders in not returning home to the port of Liverpool with a cargo of sugar for the benefit of his owners; by the chartering his ship as aforesaid; and especially by receiving 600*l.* on account of freight, and in anticipation, contrary to the terms of the charter-party, and paying such sum to Messrs. L. & B. without any authority from his owners, thereby depriving them of the full benefit of the said voyage, and entailing on the estate of the owners the wages of the crew of the ship.

9th. The usual concluding article.

The admission of this allegation was opposed on behalf of the master by *Addams* and *Robinson*.

*Queen's Advocate* and *Twiss, contra*.

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The Thomas Worthington. 3 W. Rob.

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## \* JUDGMENT.

DR. LUSHINGTON. The claim for the wages sued for in this case is comparatively of small amount, but the principle involved in the opposition which is made to the master's demand is one of very considerable importance. The \* question has been argued [ \* 132 ] very elaborately, as it deserves to be, and although I cannot finally dispose of it upon the facts as they are pleaded in this allegation, it will perhaps be advantageous to the parties in the suit that I should take a general view of the whole of the case, and state my opinion upon it. It has been argued by the learned counsel on behalf of the official assignees, that the master has forfeited his claim to wages; and authorities have been cited to support the position, that the same principle upon which mariners are subject to forfeiture of wages by reason of misconduct applies, under the late act, to the case of masters. The question in the present instance, I apprehend, is not whether the master can forfeit his wages or not; for I entertain not a shadow of a doubt that he may do so as well as a mate or common seaman. This appears to me to be obvious, without reference to the cases, upon the ordinary principles of a court of equity, and for this reason, namely, that the engagement of the master with the owner of the vessel is a contract that he shall do his duty as master of the vessel, and upon that consideration be paid a remuneration in certain wages and emoluments. How, then, can the master establish a claim under such a contract, unless he fulfils his own part of the obligation? The principle applies not merely to contracts between masters and owners and between owners and mariners, but it pervades all other contracts of service and hiring; and the only difference between this court and other courts of law in adjudicating upon such contracts is, that in this court, under ordinary circumstances, where any loss has been sustained through the negligence or misconduct of the mariner, the amount of the loss is alone deducted from the wages of such mariner, whereas in other courts no \* wages would be [ \* 133 ] recoverable at all. Cases, indeed, may occur, even in this court, where the misconduct may be of so gross a description that, independent of any actual loss sustained by the owners, the entire forfeiture of wages would ensue; as, for instance, if a master had attempted to commit barratry; or if, throughout a voyage, he had shown gross incapacity, or had been constantly drunk. In either of these cases, would this court be justified in pronouncing for any part of his wages under the contract? Unquestionably not; and if any such case came before me I should not hesitate for a single moment in rejecting his claim *in toto*.



Assuming it, then, to be clear that there may be such a violation of the contract as would entail an entire forfeiture of the wages, and that there may be such misconduct as would lead only to a partial forfeiture of the same, the question in this case is, what is the amount of the misconduct imputed to the master of this vessel under the circumstances stated in this allegation. This question, I feel, requires much care and circumspection, inasmuch as I am not aware that it has ever been judicially determined in any court whether a mere error on the part of a master, not tainted with any guilty intention or corrupt motive, would work a forfeiture of his whole wages. The difficulty of solving the question, I also feel, is still further increased in this case, because it gives rise to another more complicated question, namely, how far a master is bound to follow the directions, and to act in compliance with the suggestions, of the agents of the owners in a foreign port. As regards the first point, I am not prepared to say that any thing more can be required from a master than the honest exercise of his own discretion, according to the [ \* 134 ] degree of ability and \* experience in business which a master may fairly be supposed to possess. Cases have often occurred, and repeatedly must occur, in which a master is placed in great uncertainty and difficulty. Supposing, for instance, his instructions to be clear and specific, they may be incapable of execution ; in such a case the responsibility is thrown upon the master, and he must exercise his own discretion with reference to all the circumstances of the case. Having observed thus much upon the first point, I now approach the second more difficult and more important question ; and I do so very much in the dark, as I have no information before me what were the instructions given to the master by the owners previous to his departure from Liverpool. Looking to the contents of the allegation in question, I apprehend it is only intended to plead that the master was cognizant of the contents of the letter which the owners wrote to Messrs. Lyon & Benn, their agents at Bahia, respecting the disposal of the outward cargo and the loading of the vessel on her homeward voyage, and not that he had any particular instructions beyond the forwarding of this intention. If it was intended to plead that he had any particular and specific instructions which he had wilfully violated, the pleading is utterly defective for such a purpose, and the allegation ought to be reformed and the omission supplied. As a general position of law, it is unquestionable that there may be instructions so precise and positive, that if the master wilfully disobeyed them, though no evil consequences might arise, yet his disobedience would entail the entire forfeiture of his wages. Before, however, he can be subjected to consequences so serious, it must be

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The Thomas Worthington. 3 W. Rob.

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shown that he was fully in possession, in the most intelligible form, of the real intentions of the owners. \* Let me now [ \* 135 ] see what the master of this vessel did after his arrival at Bahia. Can it be contended in face of the letter from the agents of the owners, Messrs. Lyon & Benn, that the entering into the new charter-party was not the joint act of the agents in conjunction with the master? When they received intelligence of the suspension of payment by the owners, they refused to execute their instructions; so far, therefore, as regards the abandonment of the instructions, it was not the act of the master, it was the act of the agents of the owners. Then, what was the master to do at Bahia with an empty ship and without a cargo to carry back to his owners at Liverpool? Dr. Twiss, in the course of his argument, quoted from the work of Mr. Justice Story on the Law of Agency, (a work of very high authority, and admitted to be so by all the courts of this country,) a passage to this effect: that the incidental powers of the master are restricted to those which belong to the usual employment of the ship; that if its ordinary employment had been to carry cargo on the sole account of the owner, he had no authority to let the ship on freight; or if its ordinary employment had been to take goods on freight as a common-carrier, he will not be presumed to have authority to let the ship on a charter-party for a special engagement. I fully admit the truth of that doctrine; at the same time it is to be observed, that it does not apply to the particular circumstances of this case. Mr. Justice Story, in laying down the doctrine, refers to what a master can do where he has an option; but in this case the master had none. In the case referred to by Mr. Justice Story, the master is presumed to have an option as to what he should do, and to exercise a discretion accordingly. In this case, under the \*circumstances in [ \* 136 ] which he was placed, the master had no option at all as to what he should do.

I must now advert to another feature in this case, namely, that an arrangement was made with Messrs. Bieber & Co., the charterers, contrary to the terms of the charter-party, to advance 600*l.* of the freight at Bahia, the freight not being properly due until the arrival of the vessel at her port of discharge. It is pleaded, that this was the act of the master; and no doubt it was so to this extent, that the master signed the receipt for the 600*l.* and therefore he is responsible for that act. Looking, however, to the letter annexed to the allegation, and taking that letter as containing the truth of the transaction, it appears that Lyon & Benn themselves received from Bieber & Co. the 600*l.* The matter is not very clearly stated in this allegation, but I apprehend it to be this: Lyon & Benn, as agents and correspond-

ents of Messrs. Bieber & Co., the owners at Liverpool, were creditors of that firm, and had advanced to the vessel 250*l*. before they heard of their insolvency. As this money had been advanced on the personal credit of the owners of the ship, and as they could not consequently take a bond of bottomry, they persuaded Bieber & Co., with the consent of the master, to pay into their hands 600*l*. of the freight, they undertaking to hand over to the owners the balance of such moneys after they had discharged their own disbursements. It is said that such balance has not been paid, and that there has been a total loss of the freight to this extent. If the fact be so, and the balance has not come into the hands of the assignees, I presume that Lyon & Benn have retained it in satisfaction of some other debt. This,

undoubtedly, does not appear in these proceedings, and I [ \*137 ] am totally in the dark as to this \* fact, which is not an unimportant fact, as regards the conduct of the master. If the whole effect of the transaction was to enable Lyon & Benn to reimburse themselves, and the master was privy to the advance of the money for this purpose alone, I should hesitate much before I pronounced that it was a wilful and corrupt act on the part of the master, or an improper dealing with the money. In the first place, there had been a *bond fide* advance of money on account of the ship, and, secondly, unless the law of Bahia differs from that of other countries, although Lyon & Benn could not take a bond of bottomry, they might have arrested and detained the ship. It has been argued, that in thus lending himself to the handing over the 600*l*. to Messrs. Lyon & Benn, the master was guilty of furthering a fraudulent preference in favor of that firm over the other creditors of the owners. Is there any thing to show that he was cognizant of any such result? He was only the master of a merchant vessel, and naturally not much versed in mercantile law; am I then to assume against him, that, being aware only of the suspension of payment by his employers, he was also aware that the effect of what was done would be to give to Lyon & Benn an unfair preference over the other creditors? I will not say, that if any circumstances were alleged, fairly leading to the conclusion that he was colluding with Lyon & Benn for such a purpose, it might not work a forfeiture of his wages, but there must be evidence of this to my full conviction. It is well known, that masters of merchant vessels, however intelligent in the ordinary duties of their profession, are utterly incompetent to form a correct opinion upon questions of this kind, or to resist the [ \*138 ] influence of the agents of their owners; and, in \* ordinary circumstances, the master in this case would have been bound to follow the directions of Lyon & Benn. Upon the whole

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The Princess Alice. 3 W. Rob.

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view of the case, I do not entirely reject this allegation. If the counsel for the assignees think that, by pleading further facts or specific instructions, they can show that the master wilfully colluded with the agents of the owners, I will give them the opportunity to do so; but if not, it is utterly useless to admit this allegation; for if it be proved, to its fullest extent, I could not pronounce for a forfeiture of the wages.

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THE PRINCESS ALICE.<sup>1</sup>

December 12, 1849.

Claim of the salvors overruled, upon the ground that their services, under the circumstances of the case, did not exceed a service of towage. The general rule with respect to costs, that they should follow the decision of the cause, modified and relaxed in respect to salvors. Claim of alleged salvors dismissed without costs.

THIS was a cause of salvage, promoted by the owners and crew of the steam-tug *Conquest*, against this vessel, for services rendered to her on the river Tees, on the 14th of April, 1847.

The pleadings and the evidence in the case were very voluminous and conflicting, and the defence of the owners of *The Princess Alice* was, that the service was a mere salvage service, for which the sum of 4*l.*, paid into court, was a sufficient remuneration.

The case was argued by

*Jenner* and *Bayford* for the salvors.

*Addams* and *Robinson* for the owners.

JUDGMENT.

DR. LUSHINGTON. This case has occupied the time of the court for the best part of two days, and there is no doubt that the evidence is most exceedingly conflicting. The \*difficulty [ \*139 ] which I have to encounter in deciding it is still further increased by the consideration that the points which are involved in it seem to require both nautical and local knowledge far greater than I am enabled to supply by my own unaided and unassisted judgment. It is well known that, in questions of this kind, it is competent to

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<sup>1</sup> [S. C. 6 Notes of Cases, 584.]

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The Princess Alice. 3 W. Rob.

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either of the parties in the suit, prior to the hearing of the cause, to apply, if they think fit, for the assistance of Trinity Masters, and if the court is satisfied that it is a fit case for the intervention of those gentlemen, it will at once accede to the application, notwithstanding the dissent of the other party in the cause. In this case, (which appears to me to be peculiarly open to such an application,) neither of the parties has made any request to this effect; and they have left the court to its own exertions to elucidate questions which are of no ordinary difficulty. If, therefore, either of the parties should think that, in the decision I am called upon to pronounce, they are aggrieved from any misunderstanding of mine, either as to the locality or the points of nautical knowledge, they must bear the consequences of not having availed themselves of that mode of proceeding which it was in their own power to have adopted. What is the question which I have to determine? It is this, whether the steamer, The Conquest, performed more than a towage service, it being acknowledged that a service to this extent, at least, was rendered. In order to solve this question, I now must consider, in the outset, what are the principles which distinguish a salvage service from a mere service of towage, as they have been laid down and adopted in former decisions of this court. Without attempting any definition which

may be universally applied, a towage service may be de-  
[ \* 140 ] scribed as \*the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating her progress. Many circumstances, it is obvious, may arise in the course of such employment, which may convert the service into the character of a salvage service. As, for example, where the ship in tow is disabled in her hull or rigging, or where she is aground, or where the service itself is necessarily attended with danger, or extraordinary labor to the towing vessel. The distinguishing circumstances in each particular case requires careful and minute consideration; and it is due to the commercial interest in general that they should at all times receive that consideration from the court. On the one hand, to protect the shipowners from unjust and unnecessary payments; on the other hand, to afford due encouragement to the owners of towing vessels to afford that assistance which is so highly beneficial to the general interests of commerce. In the present instance, although the minute examination of the disputed facts is extremely tedious, and although they have been fully argued and discussed at the bar, I must address myself to the task, and state the view which I entertain of the whole case. The statement of the alleged salvors is in substance to this effect: That the steamboat Conquest was moored at the fifth buoy within the river Tees, when

she discerned The Princess Alice running for the Tees; that the sea outside the bar was so heavy that no vessel did or could leave the Tees on that day; that the steamer, in order to render the assistance, proceeded down the river towards the bar, but was forced to lie in the broken water, it being impossible to get out; that The Princess Alice came too far to the southward, when the steamer signalled her to keep more to the \* northward; but the schooner [ \* 141 ] continuing her former course, struck heavily on the South Gar sand, where she remained for a period of twenty minutes, with the sea beating half mast high over her, and the seamen taking to the rigging; that the steamer thereupon again attempted to go to her assistance, but was driven back by two seas, which caused her to ship much water; that the schooner afterwards came off the sand, and was driving before the sea towards the North Gar sand, when the steamer backed astern amidst the broken water, and having with difficulty taken the schooner in tow, pulled her head round clear of the sand, and proceeded with her into the channel, shipping two seas, which filled the engine room as high as a person's knees. Such is the summary of the service alleged to have been rendered by the steamer; and, undoubtedly, if the statement is true, and is borne out by the evidence, this service was, in every acceptation of the term, a salvage service, inasmuch that there was both risk to the steamer in performing the service, and danger to the vessel to which that service was rendered.

What is the answer to this statement as set out by the owners of The Princess Alice? They allege, that the steamer, at the time she signalled the schooner, was not in broken water, but was lying half a mile from the bar. That the signal made by the persons on board the steamer was understood by the schooner as a signal that a licensed pilot was on board, and that in consequence of that signal she endeavored to get into the river, otherwise she should have stood out to sea, which she might easily have done. That the schooner soon came off the sand, the wind at the time blowing moderately from the E. N. E., and the schooner going at the rate of only three knots an \* hour; and at the time she was taken in tow by [ \* 142 ] the steamer she was at least three tenths of a mile from the South Gar sand, and proceeded up the channel with the wind and tide in her favor. That no attempt was made by the steamer to assist the schooner whilst on the South Gar sand, and that there was no danger whatever of her being driven on to the North Gar sand. The defence, therefore, is, that there was no danger either to the steamer or the schooner at the time the service in question commenced; and if this be true, it is clear that it would destroy all claim



to salvage. It was observed by Dr. Robinson, that the owners of the steamer being the plaintiffs in the case, they are bound to establish to the satisfaction of the court the case which they set up, and no doubt that is true, because the *onus probandi* is cast upon them; and if the matter be left in doubt, it is impossible for the court to say that a salvage service has been performed, and that a salvage remuneration is due. I will now refer to the evidence in support of the conflicting statements on the one side and the other, beginning with the evidence of the salvors, and noticing, as I proceed, any other parts of the case to which I may not have adverted. (The learned judge here commented upon the evidence at considerable length; and having arrived at the conclusion that the service was not a salvage service, and that the asserted salvors were only entitled to the amount due for towage, proceeded to observe respecting the costs to the following effect :)

I now come to the last consideration in this case, namely, the question of costs; and I am afraid, looking at the multitude of the affidavits, these costs must be heavy in the present instance. The

strict principle with respect to costs undoubtedly is, that [ \* 143 ] they ought \* to follow the sentence of the court. This principle has been sanctioned by the highest authorities, and in almost all the courts is enforced with greater rigidity in the present day than it was in former times.

In many classes of cases which are brought into this court, I am disposed generally to uphold and enforce this principle as much as possible; but in cases of salvage, for reasons which I have before stated, the rule, it appears to me, must be applied with somewhat greater leniency and relaxation. The main consideration upon which such indulgence is shown, is the expediency of encouraging the exertions of salvors in the rescue and preservation of property embarked upon the seas.

It has been the policy of the maritime law of this country from the earliest times to countenance and favor this meritorious class of persons; and nothing, I conceive, would be more contrary to that policy, or more likely to damp the energies of salvors in general, than the frightening them from a recourse to this court for their remuneration by an overrigid application of the principle of costs. In the present case there appears upon the face of the proceedings an additional reason for the exercise of this relaxation, namely, that a charge has been made by the owners of The Princess Alice in their pleadings, that they were wilfully misled by the persons on board the steam-tug, and were thereby induced to make the attempt to enter the Tees. The asserted salvors were, I think, fully justified in counterpleading this

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The Tecumseh. 3 W. Rob.

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averment, in rebutting it by all the evidence they could produce against it. In this attempt they have, I am of opinion, been successful. Looking then to the whole of the case, my judgment must be, that \*the service was only a towage service, for [ \* 144 ] which the tender made is a sufficient tender; and instead of giving the full costs, I shall condemn the promoters of the suit in the sum of 50*l. nomine expensarum*.

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THE TECUMSEH.<sup>1</sup>

January 12, 1850.

In a suit for wages, brought by the master under the stat. 7 and 8 Vict., an item of 6*l.* per month for supplying cabin stores, in the agreement for wages, directed to be struck out of the alleged agreement, as being in the nature of a special contract.<sup>2</sup>

In this case, reported *ante* (page 109), a question was raised as to the admission of the libel brought in by the master.

The libel in substance pleaded: — That the plaintiff had been originally hired in this country to serve on board the vessel in the capacity of mate; that in September, 1846, the former master quitted the vessel at Moulmein, and appointed him to succeed him in the command of the ship; that he continued to act in the capacity of master during the remainder of the voyage; that the former master had received 10*l.* per month pay, and 6*l.* per month for providing the cabin with stores, under an agreement with the owner, and the plaintiff claimed the balance of his wages at the same rate for fifteen months and three days, after deducting certain sums of money received by him on the owner's account.

The admission of the libel was opposed on behalf of the owner by

*Dr. Addams*, on the ground that an allowance for furnishing cabin stores could not be included as an item of wages; that if there had been any agreement with the former master to the effect stated, which he denied, it would render the contract a special contract, over which the court would have no \*jurisdiction to adjudicate; [ \* 145 ] and that the plaintiff, claiming under the same, under the authority of *The Isabella*, had no *persona standi* in the court, but

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<sup>1</sup> [S. C. 6 Notes of Cases, 658.]

<sup>2</sup> [The Riby Grove, 2 W. Rob. 33.]

must recover his demand in a court of common law, as upon a matter of account between himself and the owner.

In support of the libel

*Bayford* submitted, that the allowance for furnishing the cabin stores was not improperly included in the master's claim, inasmuch that it was to be considered in the nature of money advanced by the master, who had to supply the passengers as well as himself; that the agreement between the former master and the owner was distinctly alleged; and if intended to be denied, it should be met by counter-plea, and not upon objection to the libel.

#### JUDGMENT.

DR. LUSHINGTON. I should be desirous, if I could do so with satisfaction to my own mind, to dispose of this case at once. I shall, however, in the present instance, confine myself to a short statement of the opinion I generally entertain of the question, and shall reserve my final decision upon it until the next court day. The claim which is set up is not the claim of a master originally appointed by the owner, but is a claim promoted by a person who has succeeded to the command upon the departure of the former master, I presume by virtue of some agreement with him. In the text books of highest authority in these courts, it is laid down, that if a master dies, or any particular circumstance occurs, such as insanity, that renders [\* 146] the master utterly incompetent to the discharge of his duties, the first mate succeeds to the command as a matter of course. To the truth of this position I entirely accede; but at the same time I doubt extremely whether a first mate, so appointed by succession to the command of the ship, would also succeed to the whole of the original contract between the former master and the owner. Even assuming that in this case the former master made a new contract with the mate when he succeeded him to this effect, what power had he to bind the owners to the terms of any such agreement? Assuming for the moment that this libel is admitted to proof, and that the party suing should prove that such a contract was entered into, I doubt very much whether the court would not be driven to decide his claim to remuneration upon the consideration of the *quantum meruit*, and refer it to the registrar and merchants to ascertain the amount. This is a question which may arise in the further progress of the case.

The particular objection to the libel is, that the claim for the 6l. cabin stores, which it sets up, is a claim wholly distinct and independent of wages, and I am inclined to hold that this objection is

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The Tecumseh. 3 W. Rob.

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well founded, for this reason, namely, that the master can only sue under the act, which puts him in the same position as an ordinary seaman, as regards the recovery of his wages, and it is well known that a seaman can sue for nothing but his wages; he cannot sue upon a special contract. If I admitted this libel, I should certainly be disposed to strike out the 6*l.* per month for cabin stores; but in so doing, I should at the same time strike out the deductions in favor of the owner. I am bound to endeavor to do justice between the parties, but I should not discharge that obligation if I deducted what the master was indebted \* to the owner, without allow- [ \* 147 ] ing the deductions on the other side. I cannot take a partial account against the master and say, "You have received so much money, which shall go in diminution of your wages," without giving him the benefit of the counter averment, that he has also disbursed certain sums of money on account of the owners by the supply of the cabin stores. The result will be, according to my present opinion, that if I am to deduct the 6*l.* per month in favor of the owner, I must also strike out the deductions in the shape of bills or money received by the master. What the effect of this will be upon the master's claim, I cannot foresee at this moment, I shall, therefore, let the matter stand over for the present.

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Upon the following court day, 23rd January, the learned judge delivered his further judgment in this case to the following effect:

Since the last court day I have carefully considered this case, which involves a very important principle as to the construction of the statute 8 & 9 Vict. c. 112. The 16th section speaks only of the recovery of wages; and, with respect to them, it places the master of a vessel precisely in the same position in which a common mariner was placed before the act passed. I must, therefore, in deciding this question, look, in the first instance, to the ancient law with respect to the wages of seamen. Now it cannot be doubted that by the ancient law, and the settled practice of this court, if a mariner, suing for his wages, had received advances in clothes, money, or in any other shape, the amount was to be deducted, \* and the mariner [ \* 148 ] would be entitled to no more than was justly due to him. It is also equally clear that in the case of a special contract he could not sue in this court. When first I had occasion to apply my attention to the construction of the statute, the difficulty that occurred to me was to ascertain the nature of the contracts which were entered into between the masters of vessels and their owners. In very many

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The Tecumseh. 3 W. Rob.

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instances (excepting, perhaps, in the coasting trade) they are *prima facie* of the nature of special contracts. They are not simply contracts for wages, but include certain other advantages or dues, which are specified in the original contract, or are guaranteed by ancient custom. This being so, the following difficulty suggested itself, namely, that if I was to consider the whole of these contracts as special contracts, I should virtually annul and render inoperative the statute, so far as the masters of vessels are concerned; if, on the other hand, I was to make no restriction, and say I will take cognizance of all contracts between masters and owners of vessels, I should arrogate to myself a wider jurisdiction than was ever exercised by this court in the case of mariners' wages. Feeling the force of this difficulty, I laid down for myself the following mode of proceeding, namely, not to consider an ordinary contract between a master and owner as a special contract, ousting the jurisdiction of the court, but to pronounce for the wages stipulated to be paid according to that contract, and to take cognizance of nothing further, saving and excepting any deductions which might be claimed by the owner, on account of advances made to the master, or on account of moneys received by him, and for which he might be indebted to the vessel.

This course I pursued in the case of *The Repulse*,<sup>1</sup> and I [ \* 149 ] am disposed to pursue the same course upon the present occasion. The objection which is taken in this case is not to the rate of wages sued for, but to the claim of 6*l*. per month, in consideration of the master finding the cabin stores. This, it is to be observed, was either a part of the original agreement, or it was not. If I am to consider it a part of the original agreement, the question arises whether I am to regard the whole agreement as a special contract, ousting my jurisdiction altogether, or whether I am at liberty to separate the agreement into parts, and to take cognizance of that portion which relates to wages, and reject that which refers to the cabin stores. I am of opinion that I am at liberty to make the division in question, and to allow the master in this case to sue for his wages. In the course of the argument, the case of *The Isabella* was cited by the learned counsel for the assignees in support of his opposition to the admission of the libel. I have referred to that case, and the result of my examination of it leads me to the conclusion that I must take the law as laid down by Lord Stowell to be, that in no case have I jurisdiction to decree payment of a claim founded upon customary right or on a special agreement. If so, I

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<sup>1</sup> [2 W. Rob. 398.]

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The Red Rover. 3 W. Rob.

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am bound to accede to the objection which has been taken by Dr. Addams to this libel, and direct it to be reformed by striking out so much as relates to the claim of 6*l.* per month for the supply of cabin stores. I must also give leave to the master to amend his schedule, and to strike out what he deems fit of the deductions he has admitted against himself in favor of the owner. I cannot confine his claim to wages only, and at the same time allow the master to come in and claim \*sums set off against those wages; that would [ \*150 ] be unjust; it would be taking the account on one side only. Libel referred back to be reformed.

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THE RED ROVER.

January 23, 1850.

Claim for salvage pronounced for, but without costs, the nature of the claim being so trivial, that, in the opinion of the court, it ought not to have been brought into the Court of Admiralty.

THIS was a claim for salvage, brought by the owners and crew of of a fishing smack, for services rendered on the 6th of October, 1847, under the circumstances noticed in the judgment of the court.

The case was argued by —

*Jenner*, for the salvors.

*Twiss*, *contra*.

PER CURIAM.

The court very much regrets that a suit of this trivial description should have been brought before it, on account of the expenses to which the parties will be put, and which are so entirely disproportionate to the nature of the demand. The circumstances of the case are these: Upon the 6th of October, 1847, the vessel proceeded against had been out fishing, and in consequence of a sudden gust of wind her masts were blown overboard. At that time, the fishing smack, *The Indefatigable*, belonging to the port of Ramsgate, came up, being also engaged in fishing, and proposed to take her in tow. After conducting her eleven miles, she reached Plymouth in safety,



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The Emma. 3 W. Rob.

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the weather being fine. I cannot say that the custom of [ \* 151 ] Plymouth, that fishing boats belonging to \* that port should assist each other gratuitously, is binding upon the owners of a boat not belonging to that port. This, however, is manifestly a case of the simplest description, and ought to have been settled on the spot; but it cannot be denied that the parties have a right to some reward. After five or six months' interval the vessel is arrested, and an action is entered in the sum of 120*l.*, the value of the vessel proceeded against being only 100*l.* I think I am bound to allot something by way of salvage. I agree with Dr. Twiss, that I have the power, and I will exercise it, to prevent a repetition of suits of this description. I shall award 5*l.*, but I will give no costs.

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THE EMMA.

January 23, 1850.

Where part of the crew of a light ship assist in rendering salvage service, the claim for salvage remuneration is confined to the persons actually engaged in the service, and does not extend to the persons left on board the light ship, as in ordinary cases of fishing smacks and other vessels.

In this case, The Emma, a Prussian brig, struck upon the Hasborough sand on the 2d of November last, and was got off by the assistance of some smacksmen in conjunction with a part of the crew of the light ship, and carried by them into Yarmouth harbor.

The value of the vessel was admitted to be 1,750*l.*, and it was contended, in the argument for the owners, that as regarded the claims of the persons who went from the light ship, the only persons who are entitled to be considered as salvors are the parties who actually boarded the vessel and assisted in carrying her into Yarmouth harbor, and that the rest of the crew of the life-boat, who remained on board their own vessel, had no *persona standi* as salvors under the circumstances of the case.

[ \* 152 ]      \* PER CURIAM.

The value of this ship and cargo is agreed to be 1,750*l.*, and the question which the court has to determine is the *quantum* of salvage which is to be allotted to the salvors. An objection has been taken by the counsel for the owners as to some of the persons claim-

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The Kingston-by-sea. 3 W. Rob.

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ing salvage, and that objection, so far as relates to the persons remaining on board the light ship, is well founded. The crew of a light ship is very different from that of an ordinary sailing vessel rendering assistance. The Emma had been on the Hasborough sand, and no one can entertain a doubt, who knows the coast, that it is a most dangerous sand. The service occurred in the beginning of November, when boisterous weather might be expected, and the difficulty of getting to Yarmouth, from the number of sands that blockade it, is well known. I think this furnishes the main ingredient in the service in question. It is manifest that the persons who came from the light ship, in allowing the boat in which they came to go away, did not apprehend their lives to be in any danger. The service was not of long duration; it commenced at 2 o'clock in the day, and the really essential services were completed the same night. I shall give 250*l.*, which must cover the demands of the persons in the William and John.

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THE KINGSTON-BY-SEA.<sup>1</sup>

February 1, 1850.

Defence of a vessel in a cause of damage, that from the proximity of the two vessels, and the fact of the damaging vessel missing stays in consequence of a sudden squall of wind, the collision was inevitable, not sustained.

*Semble*, if a vessel in close proximity to another vessel is put in stays and misses, it is the duty of the persons on board to square the mainyard and so let the vessel pay off.

THIS was a cause of damage, promoted by the owners of the late brig, The Thirsk Packet, which was run down by this vessel and sunk upon the 6th September, 1848.

\* The facts of the case are fully adverted to by the learned [ \* 153 ] judge in the course of his address to the Trinity Masters.

The case was argued by

*Bayford* and *R. Phillimore*, for The Thirsk Packet.

*Queen's Advocate* and *Jenner*, *contra*.

PER CURIAM.

Gentlemen, I will first direct your attention to the averments

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<sup>1</sup> [S. C. 6 Notes of Cases, 651.]

which are made on behalf of The Thirsk Packet; then to the defence of The Kingston-by-Sea; and finally, to the reply which has been given in. There is no dispute as to the place where the collision took place, nor as to the time; and it is not an unimportant circumstance that it took place about midday, namely, about half-past three o'clock in the afternoon, when, of course, all objects were easily visible by either of the parties in the suit. The Thirsk Packet was a laden brig, proceeding in the tow of the steamer Reaper, under bare poles,—and here I will very shortly point out the law of the case when a merchant vessel is in tow of a steamer. It is well known, that, according to your rules, a steamer is always to be considered as having the wind free; and, by the decisions in this court, a steamer towing another vessel is to be considered as in the service of the owners of the vessel she has in tow, and the owners of the vessel in tow are responsible for the acts of the steamer. According to this latter rule, therefore, if you shall be of opinion, in the present instance, that the steamer was in fault, the owners of The Thirsk Packet will have to bear the consequences.

[ \* 154 ] \* Gentlemen, it has been urged in the argument, that, as a steamer is always to be considered as having the wind free, the consideration applies whether she has another vessel in tow or not. To this proposition I cannot accede. It is true, a steamer is considered always to have the wind free, but it does not, in my opinion, follow, that a steamer having a merchant vessel in tow is always free. That will depend, I conceive, upon the state of the wind and weather, the direction in which the steamer is towing, and the nature of the impediments that she may meet with in her course. In considering this case, therefore, we must bear it in mind that the steamer, The Reaper, was not a steamer proceeding under ordinary circumstances, but having a vessel in tow, with the wind blowing about W. N. W., with an ebb-tide, and proceeding towards the north. The Kingston-by-Sea was also proceeding to the north, and was, it is stated, perceived at a distance of two or three miles; and there can be no doubt that, at the time of day when this collision took place, vessels might have been seen from each other at that distance.

The statement of The Thirsk Packet is, “that The Kingston-by-Sea continued to reach in-shore for some time, when she tacked, and made a short board off, and then tacked again and stood in-shore, apparently with a view of being taken in tow by a steam-vessel called The Victory; that she held on the tack as aforesaid until she was about one and a half miles from The Thirsk Packet; that an attempt was then made to stay The Kingston-by-Sea, but that she refused stays, and payed off (this is a fact admitted by both parties); that

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The Kingston-by-Sea. 3 W. Rob.

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thereupon her crew boarded her maintack, and hauled the sheet aft, as if to cross the hawse of The Thirst Packet; that her \*helm was then suddenly put a-weather, and the trysail [ \* 155 ] sheet eased off; that she attempted to wear without having squared her mainsail, and, continuing to approach The Thirsk Packet, she was hailed to keep her helm a-weather, and square her mainyard; but instead of so doing, when about three or four lengths distant from The Thirsk Packet, she put her helm hard a-port, and, at the rate of nine knots an hour, came right into her starboard side." You will perceive, gentlemen, that, according to this statement, one of the charges is "that she attempted to wear without squaring her mainyard." Another charge is, "that there was ample time and space to have put her in stays again, but that she neglected to adopt the necessary manœuvres to avoid the collision." Gentlemen, how far the attempt to wear without squaring her mainyard was not proper or seamanlike conduct, it will be for you to determine. With regard to the question of ample time, it appears to me that the affidavit of the master of The Victory is of the very greatest importance, because he shows that after The Kingston-by-Sea had missed stays, some lapse of time, at least, did occur, for she was hailed to take her in tow, and refused, because she was bound to Hartlepool. Another charge which must be matter for your opinion, gentlemen, is, that she put her helm to port, which she ought not to have done.

Such being the statement of The Thirsk Packet, the vessel proceeding in the case, I will now advert to the answer of the vessel proceeded against. It is stated, in the first place, that the fact of the Kingston-by-Sea missing stays was solely attributable to a sudden squall of wind, which had suddenly shifted from W. to W. N. W. I do not apprehend that this fact, even if true, can very materially assist the defence \* of the owners of The Kingston- [ \* 156 ] by-Sea; because, from whatever quarter the wind blew, it appears to me an established fact in the case that the two vessels had ample time to have seen each other at the distance of two or three miles, and consequently had ample time to have taken precautions for avoiding a collision. According to the statement of The Kingston-by-Sea, it is alleged that The Thirsk Packet was seen at the distance of 300 or 400 yards off; and it will be for you to judge whether, if their attention had been on the alert, she ought not to have been observed at an earlier period. They further state, "that The Thirsk Packet was proceeding to the N. W. by N. on the larboard bow of The Kingston-by-Sea; and the latter being near the land, and there being no possibility of weathering The Thirsk Packet, the helm was put down in order to throw her in stays; but when she had got head to

wind, and the mainyard had been hauled, a sudden squall caused her to miss stays, and fall off the wind, a circumstance which had never happened to her before. Gentlemen, one of the questions for you to decide will be, how far this fact of The Kingston-by-Sea missing stays is to be ascribed, as stated, to inevitable accident. It is alleged by the owners of The Thirsk Packet that, under the circumstances, she ought to have squared her mainyard; it will be for you to decide whether that was a nautical manœuvre fit to be adopted. It is then further stated that, the wind veering more northerly, and being abaft the beam, The Kingston-by-Sea flew to against her helm and became unmanageable, and there not being sufficient time or room to get full command of the vessel, so as to put her in stays again, or to wear

her, the helm of The Kingston-by-Sea was put a-lee, and  
 . [ \* 157 ] \* the mainyard filled, with the view of preventing a collision,

The Thirsk Packet being at this time only about three or four ships' length on her lee bow. Nothing is said in direct terms as to whether the helm of The Kingston-by-Sea was ported or not; but I apprehend it is meant to be admitted that it was. An important point for your consideration will be, whether it was seamanlike and proper to have so ported her helm when she came within three or four ships' lengths. The defence of the owners of The Kingston-by-Sea concludes with an averment in the alternative, namely, that the accident was either unavoidable, or was occasioned by the fault of the persons on board The Thirsk Packet. Let us see what the blame is which is so imputed to them. In the first place, it is suggested that the steamer should have cast The Thirsk Packet off. This, you will perceive, rests upon simple averment alone, without any reason to support it, and you will determine whether it was the duty of the steamer to have done so or not. It is suggested, in the second place, that The Thirsk Packet ought to have starboarded her helm; that although she was under bare poles, yet she had sufficient way and command; and, had she starboarded her helm, she would have gone off four points of the wind, and the collision would have been avoided.

It is lastly averred, gentlemen, that the ultimate loss of The Thirsk Packet did not arise from the effects of the collision, but from the premature abandonment of her, and in consequence of her not being towed on shore. Gentlemen, presuming that the collision arose from the fault of The Kingston-by-Sea, I need hardly point out to you that the proof must be very strong indeed to induce us to arrive at any such conclusion. So far as I can judge, it does not appear

[ \* 158 ] \* to me that it would have been practicable to have taken  
 The Thirsk Packet ashore under the circumstances of the

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The Columbus. 3 W. Rob.

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case. You will now, gentlemen, favor me with your opinion, whether you think the collision arose from inevitable accident, or from any blame imputable to The Kingston-by-Sea, and also whether any blame attaches to The Thirsk Packet.

*Trinity Masters.* We are of opinion that the collision was caused by the mismanagement of the persons on board The Kingston-by-Sea. In the first place, that vessel had it in her power to choose the distance at which she should tack, assuming that she had kept a proper look-out. In the next place, we think that if a vessel is put in stays and misses, it is the duty of the persons on board to square the main-yard, and so let the vessel pay off. Lastly, seeing a collision about to take place, The Kingston-by-Sea should not have ported her helm, as, by so doing, she only made matters worse. The Thirsk Packet, we consider, was in nowise to blame.

PER CURIAM.

I fully concur in the opinion expressed by the Trinity Masters, and pronounce for the damage accordingly.

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THE COLUMBUS.<sup>1</sup>

March 9, 1849.

Where a vessel is sunk in a collision, and compensation is awarded by the Court of Admiralty to the full value of the vessel, as for a total loss, the plaintiff will not be entitled to recover any thing in the nature of a demurrage for loss of the employment of his vessel or his own earnings, in consequence of the collision.

[If a vessel is sunk at sea by a collision, and is afterwards raised by the owner of the other vessel, and repaired, the owner is not bound to receive it back, but may recover in full therefor, and in such case the property will pass to the respondent.]

THIS was originally a cause of damage by collision, brought by the owners of the fishing smack The Tryall, against this vessel, &c.

The collision took place off Dungeness upon the 17th of \*June, 1847, and, in consequence of the damage she had [\*159] sustained, the smack was sunk. Before the proceedings were commenced in the Court of Admiralty, the smack was raised at the expense of the owner of The Columbus, and was carried into

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<sup>1</sup> [S. C. 6 Notes of Cases, 671.]



Rye Harbor, and notice thereof was given to the agent of the owner, with an intimation that the owner of The Columbus was ready to deliver up the same, and that he would not be responsible for any further damage or expense that might be incurred by her remaining unrepaired in the harbor of Rye. No notice was taken of this intimation; and on the 12th of July, 1847, a suit was commenced by the owner of the smack in the Court of Admiralty. Upon the 22d of July, 1848, the cause was heard on the merits before Trinity Masters, and they being of opinion that The Columbus was solely to blame, the court pronounced for the damage, and decreed a reference in the usual form to the registrar and merchants, to report thereupon. The registrar and merchants reported the sum of 310*l.* to be due to Mr. Woodward in full of all demands as for the entire loss of his vessel, and rejected his claim to the sum of 89*l.*, which he stated he would have earned for wages as master of the smack, and 75*l.* which he claimed as the average profits of the same from the time of the collision. This report was now objected to.

In objection to the report in behalf of the owner of the smack,

*Addams* submitted that by the principles which governed the court's proceedings in this class of cases, the owner of the smack was [ \* 160 ] entitled to a *restitutio in integrum*, and \* this principle the registrar had departed from in making the limited compensation which he had awarded. That as master and owner of the smack the plaintiff in the collision in question had been altogether deprived of more than twelve months' use and profits of his vessel. These together would have amounted to 164*l.*; and to this further sum he was entitled, otherwise he would be still a loser to that extent, and the compensation would not be perfect; that in The Gazelle, and other cases, where the damage sustained had been only a partial damage, the court had awarded additional compensation in the nature of demurrage for the loss of the vessel's employment during the repairs; and no reasonable distinction could be suggested in the case before the court to deprive the owner of The Tryall to the like measure of compensation in the present instance.

*Haggard*, for the owners of The Columbus, contended that the registrar had made his report upon the principle of a total loss, and in so doing, under the particular circumstances of the case, had acted erroneously in the matter; that the vessel, having been raised and carried into Rye Harbor, the owner of The Columbus could only be justly liable for the costs of such repairs as might be necessary to put her into as seaworthy a condition as she was in before; that the

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owner of the smack was duly apprised of the recovery of his vessel, and of her being carried into Rye ; and, but for his own obstinacy, he might have had the benefit of her employment and profit to be derived during the period of the time during which he complains of being deprived of her services; that upon the principle of *volenti non fit injuria* he was clearly \* not entitled to an addi- [ \* 161 ] tional compensation for any loss of profit occasioned by his own laches, and the registrar and merchants had, at all events, rightly reported in that part of their report which disallowed the two items for which Mr. Woodward had applied to the court.

#### JUDGMENT.

DR. LUSHINGTON. When this case was last before the court, the Trinity Masters being of opinion that The Columbus was solely to blame, I pronounced for the damage sued for, and directed a reference to the registrar and merchants in the usual form to ascertain the amount. The registrar and merchants have reported that the sum of 310*l.* 10*s.* is due to Mr. Woodward, the owner of the smack, as the full value of his vessel, and this report is now objected to by both the parties in the original suit. On the part of Mr. Woodward, the plaintiff, it is not denied that the sum awarded by the registrar and merchants is a full and fair valuation of the vessel itself; but he objects to the report upon the ground that the registrar and merchants have disallowed certain items of his claim, namely, the sum of 89*l.*, which he states he would have earned as master of his own vessel for fifty-two weeks' wages; and a further sum of 75*l.*, which he would have received as owner upon the average profits of the smack during the same period. On the part of the owner of The Columbus, it is not only denied that Mr. Woodward is entitled to the items which he claims, but it is also further contended, that the registrar and merchants have erroneously calculated the amount of the damage sustained, inasmuch that the smack was subsequently raised and carried into Rye, and she \* might have been repaired [ \* 162 ] and restored to the owner at an expense far less than the sum which has been awarded to him. Now it is clear that the registrar and merchants, in fixing the damage at the sum which they have reported, have proceeded as for a total loss, upon the same principle as if the smack had remained at the bottom of the sea and had never been recovered afterwards. How far they were right in so doing, I will hereafter advert to; for the purpose, however, of considering Mr. Woodward's claim in the first instance, I will assume that his vessel was totally lost. Under this assumption, what is the ground upon which he rests his claim for more than the full value of his vessel in

the present instance? It has been argued on his behalf that the principle upon which this court proceeds in all matters of this kind is a "*restitutio in integrum*;" in other words, the principle of replacing the party who has received the damage in the same position in which he would have been, provided the collision had not occurred. As a general proposition, undoubtedly the principle in question is correctly stated; and not only in this court, but in all other courts, I apprehend the general rule of law is, that where an injury is committed by one individual to another, either by himself or his servant, for whose acts the law makes him responsible, the party receiving the injury is entitled to an indemnity for the same. But although this is the general principle of law, all courts have found it necessary to adopt certain rules for the application of it; and it is utterly impossible, in all the various cases that may arise, that the remedy which the law may give should always be to the precise amount of the loss or injury sustained. [\* 163] In many cases it will, of necessity, exceed, in others fall short of the precise amount. To select an example amongst the cases which have occurred in this court, I may here mention the case of *The Gazelle*, which has been brought to the notice of the court, in which a larger sum was awarded than the actual loss sustained by the party suing in the cause. In respect to the question more immediately under consideration at the present moment, I do not recollect a case, and no case has been suggested to me, where a vessel has been considered as a total loss, and the full value of that vessel having been awarded by the registrar and merchants, any claim has been set up for compensation beyond the value of that vessel. When I first read the papers in this case, I looked with much care and attention to see whether any precedent could be found, whether any single instance had occurred in the numerous cases which have arisen, not only in my own time, but in that of my predecessors; but I found none; and the learned counsel, who has argued the case on behalf of Mr. Woodward, does not appear to have been more successful in his researches.

The only ground which has been suggested in the argument, in support of such claim, is the principle to which I have just adverted, namely, that the plaintiff ought to be put in the same condition in which he stood prior the collision; and in confirmation of this, the court has been referred to cases of partial loss or damage, where an allowance for demurrage has been given in addition to the actual amount of the damage committed. The principle, as applied in cases of partial loss, it appears to me, does not equally apply to the circumstances of the case before the court. Let us, for a [\* 164] moment, consider what would be the effect, in all cases of

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this kind, of giving any thing beyond the full value of the vessel destroyed. Supposing, for instance, that this vessel had been an East Indiaman, bound on her outward voyage to the East Indies, with a valuable cargo on board, for the transportation of which not only would the owners be entitled to a large amount of freight, but the master might be entitled to considerable contingent profits from the allowances made to him upon such a voyage. Could this court take upon itself to decide upon the amount of these contingencies and to decree the payment of the same in addition to the payment of the full value of the ship? I am clearly of opinion that it could not. The true rule of law in such a case would, I conceive, be this, namely, to calculate the value of the property destroyed at the time of the loss, and to pay it to the owners, as a full indemnity to them for all that may have happened, without entering for a moment into any other consideration. If the principle, to the contrary, contended for by the owners of the smack in this case, were once admitted, I see no limit in its application to the difficulties which would be imposed upon the court. It would extend to almost endless ramifications, and in every case I might be called upon to determine, not only the value of the ship, but the profits to be derived on the voyage in which she might be engaged, and indeed even to those of the return voyage, which might be said to have been defeated by the collision. Upon this consideration alone, I should not, I conceive, be justified in admitting this claim; but I am further borne out in so doing, by the difference which exists between a total loss, and the case of a partial damage, namely, that \*in the latter case the amount [ \* 165 ] of the additional injury in the loss of the freight is capable of being accurately calculated. It depends upon no contingency; it is, in point of fact, an absolute loss and, as such the owner of the ship upon whom it falls is justly entitled to compensation. Entertaining this view of the matter under consideration, I think that the registrar and merchants have exercised a sound discretion in regard to the claim which has been advanced by Mr. Woodward, and I have no disposition whatever to disturb the report in that respect.

With respect to the objection which is taken to the report of the registrar on behalf of the owner of The Columbus, I freely admit that I feel a greater difficulty in addressing myself to this part of the subject. It is not that I entertain any doubt as to what ought to be the true principle in this and other cases; but it is for these reasons — first, because it is a matter of considerable difficulty to define under what circumstances a vessel can be abandoned by the owner in a case of collision; and, secondly, because I know it to be impos-

sible to lay down any general principle which might not be open to objection; and I am reluctant to make any remarks which might lead to litigation in future cases. If I am asked whether the principle of abandonment, as applied to insurance cases, applies to cases of collision, I would answer no; and I entertain no inclination or intention to import into this court, in cases of this kind, all the rules and principles which a long series of precedents have established as the law of other courts in cases of insurance. The rule which I consider it incumbent upon this court to follow, in cases of this description, is

this, — that if a vessel is not merely run into and partially [ \* 166 ] \* damaged, but is actually sunk at sea, it is not incumbent upon the owner of that vessel to go to any expense whatever for the purpose of raising her. I apprehend this to be the true principle; but let me not be misunderstood, that this principle would apply in any case where the vessel is not actually sunk, but is only partially damaged. In the latter case, where there is the slightest chance of bringing the damaged vessel safely into port, the principle, undoubtedly, would not apply. Applying this rule then to the particular circumstances of the present case, I consider that Mr. Woodward was not bound to have weighed the smack, or to have incurred the expense of carrying her into the port of Rye. Whether he was compellable or not to take possession of her after she had been raised by Mr. Fletcher, and carried into the port of Rye, it is clear he was not bound to repair her, but might have left her lying in the port. In so doing, he would unquestionably have acted upon his own risk, inasmuch that if she had been utterly destroyed for want of repairs, and he had failed in this suit, he must have himself borne the consequence.

The proper course for the parties to have pursued would, in my opinion, have been this, namely, to have applied to the court, stating the circumstances in which the smack was, and to have called upon the court to decree a sale of the vessel, and that the proceeds might be brought in to abide the result of the suit. This course, unfortunately, has not been adopted. As the matter now stands, I think that Mr. Fletcher is still entitled to have the vessel, if he thinks fit to make an application to that effect, and the proceeds of such sale will be his own property.

[ \* 167 ] \* Upon the whole view of the case, I am of opinion that the registrar and merchants, under the circumstances of the case, have arrived at a just and equitable conclusion in regard to the claims of both the parties before the court, and I therefore have no hesitation in confirming the report generally. With respect to the costs of this application, I shall make no order, but leave each party to pay his own costs. Report confirmed.

THE GAUNTLET,<sup>1</sup> Kennedy.

May 4, 1849.

*Primâ facie* a bondholder establishing his bond is entitled to his costs.

Where, however, the general validity of the bond is established, and upon reference to the registrar and merchants a large deduction is made, and is confirmed by the court, the bondholder will not be entitled to his costs in the original suit.

The party opposing the bond in the original suit having made various charges against the bondholder, which were not established, equally disentitled to his costs in the original suit; but the costs of the reference decreed to him.

In this case, which was originally a cause of bottomry (reported *supra*, vol. iii. p. 82), the Court pronounced for the validity of the bond, and, referring the accounts to the registrar and merchants, reserved the question of costs until the report of the registrar and merchants had been made.

The registrar and merchants, having investigated the accounts, reported the amount due to the bondholder upon the bond, in the sum of 475*l.* 8*s.* 6*d.*, the original claim of the bondholder being to the amount of 1,961*l.* 11*s.* 6*d.* This report was confirmed by the court, and a motion was now made by *Harding* and *Bayford*, on behalf of the owners of the vessel, that the bondholder, having set up a claim so largely exceeding the sum allowed in the report, should be condemned in the whole of the costs in the original suit, and also in those of the reference to the registrar and merchants. This motion was opposed by

*Addams* and *Robinson*, on behalf of the bondholder, who submitted that the main reduction in \* the registrar's report [ \* 168 ] was caused by the exclusion of the claim of salvage, which had been inserted in the items of the bond, and that the registrar, under the express direction of the court, had been precluded from entering into this charge, and it was reserved to be brought before the court in another form; that the reduction in question did not affect the general merits of the bondholder's claim, and having established the validity of his bond in the original suit, he was entitled, as a matter of right, to the expenses which he had incurred in establishing his claim, more especially as the owners of the vessel had mixed up in their defence a variety of groundless charges against the bond-

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<sup>1</sup> [S. C. 7 Notes of Cases, 41.]



holder, which they had entirely failed to sustain. With respect to the costs of the reference to the registrar and merchants, the justice of the case would be met by leaving each party to pay their own costs.

PER CURIAM.

DR. LUSHINGTON. I well remember all the circumstances connected with this case, which, from its bulk and complexity, occasioned the court to bestow upon it very great consideration before it pronounced its final decision. After duly considering the facts and the evidence, I came to the conclusion that the bond was a valid bond, and pronounced accordingly, and conformably to the usual course of proceedings in these courts. The sentence so pronounced in his favor would *primâ facie* have entitled the bondholder to his costs. In the course of the discussion, however, although I was satisfied that the necessity for taking the bond was proved, and although I did not think that any of the charges which had been preferred against the bondholder had been established, yet some of the items [ \* 169 ] \* contained in the bond raised such doubt and difficulties in my mind, as induced me to depart from the usual course, and, instead of accompanying the sentence with a decree of costs to the bondholder, I referred the bond generally to the registrar and merchants, to ascertain the proper amount due upon the bond, and reserved the question of costs until the registrar's report should be brought in. In so reserving the question of costs, I was guided by the consideration, that, although by the natural principles of justice, a plaintiff who succeeds in establishing the validity of the instrument he sets up, is *primâ facie* entitled to be indemnified in the expenses to which he may be put, the principle obviously would not apply to the case of a bond of this description, where it should turn out that a very small part only of the items was justifiable, and the larger portion of them ought never to have been included in the bond. In this case, the registrar having brought in his report, and that report having been confirmed by the court without opposition, three courses are now open to me, namely, to decree costs to the bondholder, to condemn him in the same, or to leave each party to pay his own costs. The registrar's report is to this effect: He reports that, out of the sum of 1,961*l.* 11*s.* 6*d.*, claimed by the bondholder, the sum of 475*l.* 8*s.* 6*d.* only is due to him upon the bond. It is said that the deduction which is thus made from the amount originally claimed by the bondholder, could not affect the general merits of his claim, inasmuch that the deduction is confined to a single item, into the examination of which the registrar was prevented from entering by the

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especial direction of the court. It may be so ; at the same time it is to be remarked, that, at the hearing \*before the [ \*170 ] registrar and merchants, the bondholder thought fit to defend this item. Looking to all the circumstances of the case, I am of opinion that the reduction, which has been made by the registrar and merchants, is entitled to grave consideration from the court in disposing of the question of costs. Where a party makes a demand so largely exceeding the amount of the sum recovered, he is not, I conceive, entitled to his own costs, inasmuch that he ought to have framed his demand upon a more moderate estimation. On the other hand, I do not think that the owners of the vessel are entitled to their costs, because they have set up in opposition to the general validity of the bond charges which they have altogether failed to establish. My decision therefore is, that I shall give no costs on either side in the principal and original cause. With respect to the costs of the reference to the registrar and merchants, I have no hesitation in decreeing the costs of such reference to be paid by the bondholder to the owner of the vessel.

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THE JOHN,<sup>1</sup> Hay.

June 12, 1849.

Advances of freight *bond fide* made under covenant in charter-party anterior to the time when a bottomry bond is given, the bond does not attach upon the freight so advanced.<sup>2</sup>

Although by the general policy of the law freight is not due until the voyage is accomplished, it is competent to parties, by charter-party or otherwise, to covenant by express stipulation in such a manner as to control the general policy of the law.

In this case a bond of bottomry for the sum of 4,400*l.* was given by the master upon the security of the ship, cargo and freight. The validity of the bond was not disputed, and the ship was sold under a decree of the court, and the proceeds, amounting to the sum of 1,199*l.* 2*s.* 6*d.*, were brought into the registry. The sum of 566*l.* 16*s.* 7*d.* was also brought in by the consignees of the cargo, who alleged that in the course of the voyage home the \*master had re- [ \*171 ] ceived 308*l.* 5*s.* 3*d.* in prepayment of the freight, and that the sum so brought into the registry was the balance of freight due from the consignees of the cargo for the transportation of the same.

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<sup>1</sup> [S. C. 7 Notes of Cases, 61.]

<sup>2</sup> [See The Trial, reported in 7 Notes of Cases, 68.]

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The right of the consignees to make a deduction of the 308*l.* 5*s.* 3*d.* from the gross freight was denied by the holders of the bond, who in substance alleged in their act on petition, that, previous to the sailing of the vessel on her outward voyage, a charter-party was entered into between the owners and the charterers, stipulating that the master should be supplied in the Pacific with a sum of money not exceeding 200*l.*, which was to be advanced to him free of commission, and was to be deducted from the freight, together with the cost of insurance upon such advance, and that the captain's receipt was to be considered binding upon the owner. That it was further stipulated, that if the charterers, or their agents, should think fit to advance any further sum on the credit of the freight for repairs, stores and disbursements, such sums, with the interest and commission, were to be considered as part payment of freight to the master, and that the captain's receipt for the same was to be binding upon the owners. That the vessel having sailed from Launceston to Van Diemen's Land, put in to Valparaiso to receive orders from the agents of the original charterers for loading a cargo, and whilst there, the master, on the 18th January, 1848, received from such agents the sum of 280*l.* 1*s.* 3*d.* That the original charterers having, in February, 1845, assigned their charter to Myers & Co., the vessel left Valparaiso to proceed to Lima, and whilst at Lima the master received from the agent of Myers [ \* 172 ] & Co., the further \* sum of 28*l.* 4*s.* That on the 20th April,

The John sailed from Lima for London, and in the course of the homeward voyage, having received great damage from stress of weather, again put into Valparaiso, where the master was necessitated to take up on bottomry the further sum of 15,500 dollars for repairing, refitting and supplying the ship, and that when the bond was executed, no mention whatever was made to the parties advancing the money, either of the 280*l.* 1*s.* 3*d.*, advanced by the agents of the original charterers, or of the 28*l.* 4*s.* advanced by Myers & Co., at Lima, and that at the time 280*l.* 1*s.* 3*d.* was advanced, the cargo had not been put on board, and consequently that such advance could not have been made on account of freight. The answer of the consignees of the cargo in substance alleged, that the money paid to the master by the agents of the charterers was paid under the distinct understanding that it was an advancement for the freight itself by way of prepayment, and not an advance of money upon loan. That such advances were made prior to the time of the execution of the bond, and even before the bond was contemplated, and that the master, upon each occasion of the advances being made, had given receipts for the same, stating that they were made for the disbursements of

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the ship, and were to be deducted from the freight which might be due under the terms of the charter-party.

For the bondholder,

*Jenner and Bayford* submitted — That an obvious distinction was to be found in the wording of the charter-party between the advance of the 200*l.*, which was to be made to the master in the Pacific, \* and any further advances that might be supplied. That, look- [ \* 173 ] ing to the terms of the charter-party, the fair construction of it was, that an advance to an extent of 200*l.* was to be made by the charterers' agent, on the security or by way of loan on the freight, and that any further advances were to be considered as actual prepayments of the freight itself. That this mode of anticipating the freight by private agreements between the owners of vessels and the shippers of goods was a departure from the ancient principle of maritime law, that freight was not due until the voyage was performed, and such agreements were to be regarded with much jealousy, inasmuch that if all advances could be protected by clauses in a charter-party, as was now attempted, the principle might be extended to the whole of the freight, and would throw a new risk upon the lenders of money on bottomry, and consequently be detrimental to the facilities of procuring loans on bottomry. That in the present instance, the persons who had lent the money had done so upon the supposed security of the ship and the entire freight, no mention having been made to them by the master of the advance in question. That the master *pro hac vice* was to be considered as the servant of the consignees of the cargo on board, and having been guilty of a species of fraud, in studiously concealing from the bondholders that portions of the freight had been anticipated, the consequences must fall upon the consignees of the cargo, and not upon the bondholder, who had no opportunity of ascertaining the fact, and of protecting himself against it.

*Robinson and Twiss, contra.*

That, although by the general policy of the law \* of Eng- [ \* 174 ] land freight does not become due until the voyage has been performed, it is competent to parties by charter-party or otherwise to covenant by express stipulations in such manner as to control the general policy of the law. That this principle has been laid down by Lord Tenterden in his book on Shipping, and has been adopted both in this court and in the courts of common law. That in this case the charter-party expressly bound the charterers to advance 200*l.*, not by way of loan, as was contended, but by way of prepayment of

the freight itself, giving them the option of making any further advances; and if the ship had been lost in the course of the voyage, the charterers could not have recovered from the owners any portion of the money so advanced. (*De Silvale v. Kendall*, 4 Mau. & Sel. 37; *Saunders v. Drew*, 3 Barn. & Adol. 445.) That the two clauses respecting the original advances of the 200*l.* and the further advances must be taken together, and the attempt to raise a distinction between the advances to be made under them, was not borne out or supported by the charter-party itself. That if any fraud had been practised upon the lenders of the money by the master's concealment of the fact that such advances had been made, such fraud could not affect the question in this court, and the bondholder must look elsewhere for his redress, either against the owner or the master.

JUDGMENT.

DR. LUSHINGTON. In this case it appears that the vessel having put into Valparaiso on her homeward voyage from Lima to the port of London, a bottomry bond was granted by the master in the sum of 4,400*l.*, and the amount of the value of the ship and of the freight which has been brought in is insufficient to satisfy that bond.

[ \* 175 ] \* It also appears that before the vessel left this country, a charter-party was entered into between the owners of the vessel and the charterers, in which it was stipulated that the master was to be supplied by the charterers in the Pacific with a sum not exceeding 200*l.*, free of commission, which was to be deducted from the freight, together with the costs and insurance on such advance; and if the charterers, or their agents, should think fit to make any further advances for the disbursements of the ship, such advances, with interest and commission, were to be considered as part payment of the freight, and the captain's receipt for such payment was to be binding upon the owners.

Prior to the arrival of the vessel at Valparaiso, two sums of money, making together the sum of 308*l.* 5*s.* 3*d.*, were advanced to the master under the terms of the charter-party; and the vessel having undergone very extensive repairs at Valparaiso, the master was necessitated to take up on bottomry the further sum of \$15,000, for which the bond in question was executed. The validity of this bond is not disputed. The ship has been sold under the decree of the court, and the proceeds have been brought into the registry. A further sum of 566*l.* 17*s.* 6*d.* has also been brought in by the owners or consignees of the freight, being, as they allege, the whole amount due for freight, after deducting the advances to the master. The right to make this deduction is denied by the owners of the bond. The question, there-

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fore, which I have to decide is between the bondholder and the owner or consignees of the cargo; and if I had not fully satisfied my mind as to the ultimate conclusions to which I ought to arrive, I should certainly have taken time for deliberation before I delivered \* my judgment. Entertaining, however, no hesitation upon [ \* 176 ] the subject, it would, I conceive, be a mere waste of time if I delayed to pronounce my decision. With regard to the advancement of freight, it is, I apprehend, clear beyond all doubt, that wherever freight has been *bonâ fide* advanced anterior to the period when a bottomry bond is given, the bond does not attach upon the freight so advanced; it might, indeed, savor of fraud, if the master should keep back from the knowledge of the party about to advance his money on bottomry of the ship, that the freight had been so advanced; yet, even such concealment on the part of the master would not, I conceive, affect a question of this description, when brought before this court. In order to simplify the matter, I will take, for example, the case of a vessel sailing from the port of Liverpool to Valparaiso, or any other foreign port, and that the owner of such vessel, being in want of money, consents to charter his vessel, with an agreement that he shall receive, paid down in advance, a fixed sum, which may be less than he would be entitled to receive if he waited until the voyage was completed and the freight was earned. In such a case it would not, I apprehend, be questioned for a single moment that the receipt of the money in advance by the owner was not, in point of fact, a payment of the freight to all intents and purposes; and that the freight so prepaid and received could not be made the subject of any subsequent bottomry transaction. This brings me to the consideration, how far the circumstances of the present case assimilate to the case which I have just stated; in other words, whether the advances alleged to have been made by the agents of the charterers in this case, antecedent to the execution \* of the [ \* 177 ] bond, were simply an advance or loan of money on the security of the freight to the owners, or were in reality a payment beforehand of the freight itself. It was urged, in the argument of the learned counsel for the consignees of the cargo, that if the ship and cargo had by any casualty been lost on the homeward voyage, the charterers could not have recovered from the owners of the vessel the money which they had advanced by way of prepayment of freight, and a variety of cases were cited in support of this position. Respecting the principle contended for, I entertain no doubt whatever; the case referred to by Dr. Robinson, *De Silvale v. Kendall*,<sup>1</sup> is conclusive

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<sup>1</sup> [1 Maule & Sel. 37. See also Abb. on Ship. (6th Am. ed.) p. 408, note.]



upon it, being a decision of four judges of the Court of Queen's Bench, who were remarkable for their knowledge of mercantile law, namely, Lord Ellenborough, Mr. Justice Le Blanc, Mr. Justice Bayley, and Mr. Justice Dampier. The question, however, which I am called upon to decide, in my view of the case, turns upon the construction of the charter-party itself. In construing that charter-party, I must endeavor as far as possible to ascertain what was the true meaning and intention of the contracting parties, and to give effect to that meaning, provided they have expressed themselves in terms sufficiently definite to be understood. The charter-party, in the present instance, after specifying what is to be the freight of the homeward cargo, stipulates to this effect:—"The master to be supplied in the Pacific with a sum not exceeding 200*l.*, free of interest and commission, which is to be deducted from the freight at the rate of 48*d.* per dollar, together with the cost of insurance on such advance, the captain's receipt to be binding upon the owner." Under

[ \* 178 ] this clause in the charter-party, as I understand, the \* sum of 280*l.* was advanced, in the first instance, by the agent of the charterers. The charter-party then further provides in these words:—"And should the charterers or their agents think fit to advance any further sum on the credit of the freight, for repairs, stores, and disbursements, such sums, with interest and commission, to be considered as part payment of freight, the master's receipt for which is to be binding upon the owners."

In considering the effect of these two clauses in the charter-party, I conceive I am bound to take them together, and not to divide them into two separate and distinct questions. I should otherwise violate the proper principle of construction to be applied to instruments of this kind, which is as follows, namely, to take into consideration the whole of what is stated by way of stipulation, and endeavor to extract from it the true meaning of the parties. The first question, then, will be, whether there is any distinction to be made between the original advance of 280*l.*, made in the first instance at Valparaiso, and the further sum of 28*l.* 4*s.* which was subsequently advanced by the agents of Myers & Co. at Lima.

By the first clause, it is to be observed, the master is to be supplied with a sum not exceeding 200*l.*, and this sum the charterers are bound to advance. They have no option in the matter, and they cannot decline to make such advancement without violating the agreement by which they have voluntarily bound themselves. The advance so made, it is further stipulated, is to be free of interest and commission, and is to be deducted from the freight. What I have now to consider upon this part of the charter-party, must be, whether,

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in the intention and understanding of the contracting parties, this original advance was \*to be made as a loan of [ \*179 ] 200*l.*, free of interest and commission, and to be deducted from the freight on account, or was it to be taken as an advance of part of the freight itself. From the concluding words in the clause, "the captain's receipt for which is to be binding on the owners," it is possible, that, if taken by itself, some little doubt might arise as to the construction of the clause. It might, on the one hand, be deemed, in the opinion of some persons, "that the strict construction of the words implied that the advance was to be an advance not of freight, but of money, to be deducted from the freight afterwards;" on the other hand, it might be construed that, notwithstanding the mode in which it is expressed, it was really and substantially to be an actual advance of the freight itself. For the solution of any doubt which might thus arise, we must look to the remaining clause in the instrument, which stipulates in these words, "that should the charterers or their agents think fit to advance any further sum" (the word advance, be it remarked, being somewhat equivocal, because it may imply an advance for freight, or an advance of money on the security of the freight,) for repairs, stores, and disbursements, such sums, with interest and commission, to be considered in part payment of freight to the master, the captain's receipt for which is to be binding on the owners. Looking to the words of this last clause, I cannot entertain a doubt that it was the intention of the contracting parties that any advance of money beyond the 200*l.* was to be considered a prepayment of the freight to the extent of the advances which should be made. If this be so, upon what ground can any distinction be made between the two sums? Could it be the intention of the parties that the \*master was to be entitled as a matter of [ \*180 ] right to the 200*l.*, which was to be merely a loan of money, and that when it was optional to the charterers, or their agents, to advance or not, such voluntary advances should be a payment for the freight itself? I cannot admit of any such distinction. In the course of this argument, the words free of interest and commission were much commented upon, as raising a material distinction between the two kinds of advances; but they do not, I confess, in my mind, create any very strong impression one way or the other. The reason for inserting them, it appears to me, was this,—the master will want money for disbursements, and we will undertake to advance him what will be about the probable sum he will require, namely, 200*l.* This sum we, the owners of the cargo, are content to pay in advance, without taking any interest or commission. With respect to all further sums, the extent of which is optional, and must be determined by our

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agents in a distant part of the world, we consider ourselves entitled, and fairly entitled, to charge interest and commission upon them. This, in my view of the case, is the true distinction to be deduced from the words of the two clauses taken together, and I cannot think that any other distinction was intended by the contracting parties, when the charter-party was executed. Putting this construction upon it, I feel it my duty to pronounce that the owners of the cargo have fulfilled their obligations, by bringing in the sum of money which they have already paid into the registry, and I therefore dismiss them from any further demand for the holder of the bond, with their costs.

[ \*181 ]

PURISSIMA CONCEPCION.<sup>1</sup>

July 28, 1849.

An agent of Lloyd's at an outport, who had undertaken to relieve a vessel from her difficulties in that character, and had merely employed the necessary hands to perform the service, without having himself incurred any personal risk in the transaction, allowed to claim as salvor.<sup>2</sup>

THIS was a cause of salvage, promoted by Mr. Brambles, agent to Lloyd's at Bridlington, for services rendered to this vessel.

The vessel, belonging to Spanish owners, and bound on a voyage from Dronthiem to Bilboa, was stranded near Bridlington in October, 1848. Mr. Brambles, ship agent, and also agent to Lloyd's, having been applied to by the master, took charge of the ship, and employed men to unlade her, and by their assistance she was got off and conveyed into the harbor of Bridlington, where the cargo was sold by Mr. Brambles. Mr. Brambles having sent in his charges, the accounts were disputed, and were referred by agreement to arbitration, and the reference having gone off, Mr. Brambles now brought his action, claiming to be remunerated as salvor. The claim of Mr. Brambles to a salvage remuneration for his services was resisted, upon the ground that he had been employed by the master in the character of ship's agent, and that he had rendered no personal service, and had incurred no personal risk in releasing the ship from her difficulties.

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<sup>1</sup> [S. C. 7 Notes of Cases, 150.]

<sup>2</sup> [See *The Lively*, 3 W. Rob. 64.]

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For the salvors, *Harding*.

*Addams, contra*.

JUDGMENT.

DR. LUSHINGTON. I greatly lament the mode in which this case has been conducted, more especially as regards the manner in which the evidence has been taken in the cause. The affidavits which have been brought in are \*more than usually numerous in a cause of this description, and many of these affidavits, it is obvious, embrace a detail of circumstances utterly irrelevant to the issue before the court. The introduction of these affidavits must necessarily lead to a very considerable increase of unnecessary expense to the parties in the suit. The real question before the court is simply this, whether the suit promoted by Mr. Brambles, the agent to Lloyd's at the port of Bridlington, is maintainable or not? The question is of some importance; and if I had not had an opportunity of carefully considering it before I came into court, I should have thought it necessary to take further time before I pronounced my opinion. The principle, however, on which the question mainly turns, was agitated at some length in the discussion of the act on petition praying the court to stay further proceedings in the cause, and I not only listened with due attention to the arguments of the learned counsel during the discussion in question, but I have since further deliberated upon the principle itself, and have also referred to the cases of *The Favorite*<sup>1</sup> and *The Happy Return*,<sup>2</sup> which were cited.

Divesting the question, for the moment, of all reference to the peculiar circumstances of the case immediately before the court, let us, in the first place, consider how far, upon general principle, the court has jurisdiction in a case of the following description. I will • assume the case of a vessel becoming stranded in the vicinity of a port where there resides a person carrying on the business of a merchant and ship agent, and that the master applies to such person, in his character of ship agent, for such assistance in getting off the ship and cargo as under the circumstances may be necessary. I will \*further assume that such agent undertakes the task, [ \*183 ] and employs the necessary persons to perform it, he himself

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<sup>1</sup> [2 W. Rob. 255.]

<sup>2</sup> [2 Hagg. Ad. R. 198.]

personally superintending the operations, but taking no active part in the duty, and not incurring the slightest risk to his own life or danger to his person.

The question is, whether an individual claiming as salvor, under such a state of circumstances, can or cannot maintain his action in this court? Upon a balance of all considerations, independently of decided authorities, I am clearly of opinion that it is for the advantage of all parties concerned, and for the benefit of the mercantile interests in general, that the court should possess the jurisdiction to entertain the suit.

In the first place, it appears to me that both the shipowner and the owners of the cargo would be benefited by the intervention of the court's authority in the matter, inasmuch that this court would take cognizance of the whole of the case, and would take care that no improper expenses were allowed, and that nothing should be taken in the nature of ship-agency or of salvage which was not fairly earned, and to which the party claiming as salvor was not justly entitled. In the case of foreign owners, the advantage, I conceive, would be still greater, in enabling them to procure with greater facility the assistance of persons of this description, who are most useful in effecting and superintending services of this kind, and who might naturally hesitate to undertake the duty upon the mere personal credit of the master, or the foreign owner whom he did not know. As regards the ship-agent himself, the same consideration equally applies, because, supposing him to perform the duty [ \* 184 ] fairly and assiduously, he is assured of \*receiving a proper reward out of the property which becomes subject to the jurisdiction of the court, and he is not left to the chance of recovering it from a foreign owner or master.

For the reasons which I have thus stated, it is, I conceive, highly desirable that the court should possess and entertain the jurisdiction in question; at the same time I confess I should have felt some hesitation in exercising this jurisdiction upon a mere theoretical reasoning alone, if I had not been supported by previous decisions of the court.

Antecedent to the cases which were cited by the learned counsel at the bar, two cases have occurred within my recollection, which, as far as I can trace, are not recorded in any of the Reports. The first case was an application made by a magistrate in Ireland for a reward for salvage services, which consisted in the sending police officers to protect the cargo of a stranded vessel. There may be some doubt whether Lord Stowell did not go too far, but he allotted the sum of 100*l*. There was also another case which came before Lord Stowell, The Lord

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Cranstone,<sup>1</sup> in which, although the Lord Judge did not formally decide the question, yet he said, "How could there be a better jurisdiction to determine it than the Court of Admiralty?" In the case of *The Happy Return*, the whole question formally came under the consideration of Sir Christopher Robinson, and that learned judge bestowed upon it all the care and attention which its great importance required. The result of Sir Christopher Robinson's decision was, that a person might act as an agent and claim as a salvor, although he did not actually perform in person any thing strictly in the nature of a salvage service — the circumstances of each case must almost necessarily \* differ from each other — but [ \*185 ] having already followed the authority of Sir Christopher Robinson in the case of *The Favorite*, I am not inclined, upon the present occasion, as far as the general principle is concerned, to depart from the opinion which I entertained and expressed in giving my decision in that case.

Being thus disposed to uphold the general principle, I must now look to the particular circumstances of the case, to see if they induce me to make any departure from it in this case.

The original affidavit to lead the warrant is, as I have already observed, extremely meagre and unsatisfactory, detailing, as it does, a great variety of circumstances which are utterly irrelevant to the question, before the court, and which can in no degree affect my judgment in this case. The court has also to complain of the delay which has taken place in bringing the suit before the court. This circumstance has been much pressed in the argument, and I think not improperly pressed; at the same time, unless Mr. Brambles is legally barred from proceeding in the cause, I cannot reject his claim altogether upon this ground.

Another feature in the case deserving of notice is, that the action is brought against the ship alone, and it is perfectly obvious that the court cannot do justice to both the parties in the cause as the case now stands. I could not proceed to make an award in favor of Mr. Brambles, supposing I had a *constat* of the value of the ship, without taking notice of the cargo, because it appears that he had possession of, and has sold the cargo, and it may turn out that out of the proceeds of that cargo he has paid himself, not merely the commission and the salvage due upon the cargo, but a great deal more than the court would \* be disposed to give [ \*186 ] him. Looking at these facts, it is clear that I cannot pro-

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<sup>1</sup> [Not reported, but cited at some length in 2 Hagg. Ad. R. 207.]



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The Glory. 3 W. Rob.

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ceed to make any decree whatsoever except in the dark. I shall therefore hold my hand until the whole matter is investigated, and the order which I shall make is this, to refer to the registrar and merchants all the accounts, including those which are exhibited, and the moneys received and paid with reference both to the ship and cargo. If it should happen that Mr. Brambles is still in possession of the proceeds of the cargo, he must account to the court for every thing he has received and paid, and he must satisfy the court that all the payments are just and fair. Unless this is done, he will receive nothing in the nature of a reward for his services. On the other hand, if the court is satisfied that the account has been fairly rendered, and that the expenses have not been improperly or unjustly incurred, the court will be prepared to award him out of the remaining proceeds such remuneration as the justice of the case requires. Surely the owners cannot object to this. They will have the benefit of a proper investigation of all the claims against the ship and cargo, and whilst they will recover the proceeds of the cargo, if they have been unjustly withheld, they will pay no more than, according to the judgment of the court, is a fair and just reward for the services rendered. Referring the case to the registrar and merchants, I reserve all further questions, including that of costs.<sup>1</sup>

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[ \* 187 ]

\* THE GLORY.<sup>2</sup>

November 6, 1849.

Where witnesses are examined *vivâ voce* in the Court of Admiralty, under the stat. 3 & 4 Vict. c. 65, s. 17, the mode of conducting the examination is to be conducted upon the same system as is adopted at *Nisi Prius*, namely, by examination in chief by counsel for the plaintiff, and cross-examination by the counsel for the defence.

In this case an application was made to the court to issue subpoenas against certain persons, who were sworn in the affidavit to lead the motion, to be necessary witnesses in the cause, and who had refused to make affidavits in the usual form, for the purpose of compelling them to attend to be examined *vivâ voce*, under the provisions of the statute 3 & 4 Vict. c. 65, s. 17.

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<sup>1</sup> [Reported further in 7 Notes of Cases, 503.]<sup>2</sup> [S. C. 7 Notes of Cases, 262.]

## PER CURIAM.

In this case the court has been moved to issue subpoenas to compel the attendance of certain witnesses to be examined in this cause, under the provisions of the statute 3 & 4 Vict. c. 65, s. 17. The power which is conferred upon the court by the act in question is a discretionary power, leaving it to the court to determine whether, upon a review of all the circumstances of the case, the court will exercise the power or not. The question, therefore, which I have now to decide is consequently narrowed to this, namely, whether the facts disclosed in the act on petition, and in the affidavit of William Seago, are sufficient to induce me to conclude that I ought to exercise the authority in the present instance. Two important facts are put in issue in the pleadings in the cause. The first is, whether or not the vessel, when lying upon the sand, required for her safety that the cargo should be unladen; and secondly, whether or not the master was in a state of intoxication at the time. The act on petition contains express reference to the individuals now sought to be examined as material witnesses upon both of these points, and Mr. Seago in his \*affidavit swears that applications have been made to them, [\* 188] and they have refused to give their evidence by affidavit in the usual form.

No counter-affidavit, it is to be observed, has been brought in on behalf of the owners, and the statement of Mr. Seago, that applications have been made for the evidence of the witnesses, and had been refused by them, remains altogether uncontradicted. If there had been any negation of the affidavit of Mr. Seago, or if any disposition had been shown by the owners, even in this stage of the proceedings, to procure from the witnesses affidavits in the usual form, the court, seeing the inconvenience that may arise from the exercise of the power, would have been disposed to discountenance the application of the asserted salvors. As the case stands before the court, however, it does appear to me that it falls properly and fairly within the case contemplated by the legislature in framing the statute, and that I should deprive not only the parties applying, but the court itself, of that evidence which may be essentially necessary for the just decision of the cause, if I refused to exercise the power upon the present occasion. Having arrived at this conclusion with respect to the propriety of issuing the subpoenas as prayed, it remains to be considered in what way the court will best carry the act into execution.

The words of the 7th section are to the following effect: "That in any suit depending in the High Court of Admiralty, the court, if it shall think fit, may summon before it and examine, or cause to be examined, witnesses by word of mouth." Thus far the words of the

section obviously refer to a *viva voce* examination, and confer upon the court the power of examining the witnesses itself, or of [ \* 189 ] causing \* them to be examined by some other person; whether, however, such examination shall be conducted by an examiner of the court, or by counsel in the cause, or by any other party, the act is perfectly silent. The 7th section then proceeds to enact, "That note of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner as the judge shall direct." From these words it might be inferred, that the act intended the examination should be conducted by the judge alone, or by an examiner appointed by the judge, the registrar taking down the evidence as it is given. Without bestowing upon the matter more deliberation than I have had the opportunity to give it, and without the benefit of hearing it discussed by counsel, I should feel some difficulty in expressing a decided opinion as to the precise meaning and intention of the act, with respect to the mode of carrying its provisions into effect. I am relieved, however, from the necessity of giving any such opinion upon the present occasion, by the consideration that there is nothing in the act which would exclude the court, provided it thinks fit to direct the examination to be conducted in the form ordinarily adopted in cases at *nisi prius*. I have no disposition myself to depart from the ordinary mode of conducting the proceedings in this court by taking the evidence upon affidavit; but if I am bound to commence a new course in respect to the *viva voce* examination of the witnesses, it is only consistent with justice that such examination should be accompanied by a cross-examination. It is very true, that, under the words of the 7th section of the act, the court has the power to examine the witnesses itself, but I shall decline to exercise this power in the present instance, [ \* 190 ] because \* I should be reluctant to take upon myself the *onus* of determining what were the proper questions to be put. It is probable, on the one hand, that I might omit many questions in the examination in chief which the counsel for the plaintiffs might think important; on the other hand, I might not sift the witnesses on interrogatory to the extent that would be satisfactory to the defendant. My opinion therefore is, that the witnesses about to be subpoenaed shall be examined, in the first instance, by Dr. Jenner, on behalf of the salvors, and shall then be cross-examined by Dr. Harding, on behalf of the owners; the court, as a matter of course, reserving to itself the right of putting any questions which it may think necessary to elucidate any point in the case. I shall direct the case to stand over until the next court day, to see if these gentlemen are

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willing to give their evidence on the affidavit; if they are not, the subpoenas must then issue.

The parties still refusing to make affidavits, the subpoenas were issued, and on the 18th November they were examined *viva voce* in open Court.

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THE ROB ROY.<sup>1</sup>

November 23, 1849.

Where steam vessels are navigating under the rules of the admiralty with respect to the number and color of the lights to be carried, it is essential that the master of each vessel should see that his lights are properly trimmed and burning. The green light of the plaintiff's vessel having gone out previous to the collision, the plea of the defendant, that the master of his vessel, upon the supposition that the vessel approaching was a sailing vessel, acted in conformity to the general rules of navigation by porting her helm, sustained.

In this case an action by plea and proof was brought against this vessel by the owners of the steamship Unicorn, for damages by collision, whereby The Unicorn was sunk and totally lost.

On behalf of The Unicorn, it was in substance alleged in plea, that she left Hull on a voyage to Antwerp, with merchandise and passengers, on the 21st January, 1849. That her Majesty's steamships, \*and all other steamers navigating the coasts and [\*191] channels of this country, have for some time past used or carried a bright white light at the foremast head, a green light on the starboard bow, and a red light on the port bow, such colored lights being fitted each with a screen of wood or canvass on the inboard side in order to prevent both from being seen at the same time from any direction but that of right a-head. That directions to that effect were issued by the Lords Commissioners of the Admiralty prior to January, 1848, and were republished for the information and observance of all steam and other vessels by the corporation of the Trinity House of the port of Kingston-upon-Hull, to which port both these vessels belonged. That each of the two vessels was furnished with such lights, and was carrying the same. (The Unicorn's green light being extinguished just prior to the collision.) That, at 10.45 P. M., The Unicorn, in the prosecution of her voyage, was about fifty miles

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<sup>1</sup> [S. C. 7 Notes of Cases, 280.]

S. by E.  $\frac{1}{2}$  E. from The Newarp light-ship, the wind blowing strong from the W. S. W. by W., with a heavy sea, the sky being dark but clear. That a proper look-out was at such time kept aboard The Unicorn, when a bright light was observed by two seamen stationed on the bridge on the starboard bow, who immediately sung out, "light on the starboard bow;" whereupon the master, perceiving the light between the starboard paddle-box and the head of The Unicorn, ordered her helm to be starboarded a little, which was done, and he continued with the look-out men to watch the light, which became broader on the starboard bow. That the master called out "steady," the ship's head being S. S. E., and he then took the bearing of the light, which was S., it being then visible to the [ \* 192 ] \* master, standing near the wheel, outside the starboard paddle-box. That about ten minutes after the light had been first seen, a green light became visible below and on the left of the bright light, and broad on The Unicorn's starboard bow, whereupon the master concluded that the vessel was a steamer, and was passing to starboard. That at such time the green light on The Unicorn's starboard paddle-box was burning brightly, and continued to do so for some minutes afterwards, and must have been visible to those on board The Rob Roy, if keeping a good look-out. That immediately on seeing the green light on board The Rob Roy, the master of The Unicorn again ordered that vessel's helm to be starboarded, which order was instantly obeyed, and the vessel answered her helm. That at such time The Rob Roy was well to starboard of The Unicorn, and the smoke from her funnel was blowing across the Unicorn's bow. That a heavy sea just at this time broke over The Unicorn, and extinguished her green light; that the white, however, light continued to burn brightly on her foremast head, and that her red light neither at such time nor at any other time was visible to those on board The Rob Roy, by reason of the screen on the inboard side. That shortly afterwards The Rob Roy suddenly ported her helm, as was apparent from her green light disappearing, and her red light becoming visible; that the two vessels were then near each other; and the master of The Unicorn, seeing that a collision was inevitable, instantly ordered the helm to be put hard a-starboard, which was done, but that, notwithstanding, The Rob Roy, it will be seen, almost immediately afterwards struck The Unicorn a violent blow abaft her starboard paddle-box, and rebounding, struck her a second time on her star- [ \* 193 ] board \* quarters; shortly after which The Unicorn sunk with her cargo, the passengers and crew being saved on board The Rob Roy. That the collision was solely imputable to those on board The Rob Roy having so put her helm apart, and that

the loss sustained by the owners, of The Unicorn, and her cargo, amounted to 24,000*l*.

On the part of the owners of The Rob Roy, a responsive allegation was given in and admitted, in substance pleading, that The Rob Roy, which was proceeding at the time of the collision on her voyage from Antwerp to Hull, was furnished with a bright white light of extra strength, having two separate burners, and visible at from four to five miles distant, and such light was exhibited during the voyage at the foremast head. That a green light was displayed in front of the starboard paddle-box, and a red light in front of the port paddle-box, both fitted with inward screens, and visible for two or three miles. That at 10.30 P. M., The Rob Roy was pursuing her direct course towards The Newarp light ship, the wind blowing a stiff breeze from the S. W., and the sea running heavy. That a good look-out was being kept, when the man stationed on the bridge between the paddle-boxes saw, at the distance of about three miles, a single bright white light right ahead, and immediately reported it to the mate, then standing on the poop, who thereupon gave orders to port the helm, which was directly done. That the master, hearing the light reported, and the order given to port the helm, came on deck, and the white light being then on the larboard bow of The Rob Roy, apparently about a mile and a half distant, ordered the helm to be kept a-port, which was done. That the strange light was thereupon brought to bear right \*abaft The Rob Roy's larboard pad- [ \* 194 ] dle-box, and was seen between such paddle-box and the main rigging by the persons stationed near the wheel. That the helm of The Rob Roy was steadied, and the strange light was kept constantly in view; and in a few minutes it appeared to near The Rob Roy very rapidly, whereupon the helm of The Rob Roy was put hard a-port; that the engines of The Rob Roy were immediately stopped and reversed, but, notwithstanding, she struck The Unicorn very violently, and from the effect of the blow she sunk shortly afterwards. That the bright white light of The Unicorn was the only light seen from The Rob Roy, and the green light was never at all exhibited. That it was impossible for the master or crew of The Rob Roy to say what was the description of the vessel which was so seen approaching, nor the course she was steering, and under such a state of circumstances, the measure adopted by The Rob Roy of porting her helm was the proper measure to be pursued, and was in accordance with the rules of navigation, and the Trinity House regulations. That the collision was occasioned by the negligence of the persons on board The Unicorn in not exhibiting the proper light, and in their want of nautical skill in starboarding the helm, and in not



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having stopped or eased her engines, or taken the proper precautions to avoid the collision after The Rob Roy was discovered, and the course she was steering had been ascertained.

The case was argued by

*Addams* and *Twiss* for the owners of The Unicorn.

*Bayford* and *R. Phillimore* for The Rob Roy.

[ \* 195 ]      \* PER CURIAM.

The main question to be disposed of in this case is, whether the persons on board The Rob Roy were guilty of any misconduct, negligence, or want of skill, which led to this unfortunate collision. If this question be determined in the negative, it will, I apprehend, be altogether unnecessary for us to pursue the investigation further, in respect to the conduct of the master and crew of The Unicorn, the vessel proceeding in the cause.

In the libel which has been given in by the owners of that vessel, reference has been made to a certain paper of instructions, issued by the Lords of the Admiralty, and it is alleged in the pleadings, and has been argued in their behalf, that the two vessels, at the time when the collision occurred, were in the fourth position pointed out in the paper in question, and consequently The Rob Roy was bound to have followed the directions laid down for the conduct of a vessel in that situation.

The words referring to the fourth position or situation are to the following effect: "Fourth situation. Here a green light only will be visible to each vessel, the screens preventing the red lights being seen, they are therefore passing to starboard, and will starboard their helms with confidence." Now if the lights, which are directed to be exhibited by the respective vessels, be duly lighted and visible from each other, it is clear that the green light, when seen alone, would indicate that the vessels were approaching each other on the starboard bow, and consequently the measure of each vessel starboarding her helm would enable them to pass clear of each other.

Assuming, however, that, from accident or any other cause [ \* 196 ] the green light should not be visible to each of the \* two vessels, it is equally obvious that this rule and direction would be altogether inapplicable.

In the present case, it is admitted on both sides that the green light on board The Unicorn was extinguished; in considering, therefore, the conduct of The Rob Roy, we must entirely leave out of consideration the regulations to which I have adverted, and must see, in the

first place, whether she was justified in porting her helm ; secondly, whether the stopping and reversing the engines was a proper measure to be adopted ; and lastly, whether these measures, if proper, were taken with due promptness and expedition. In the course of the argument, it was contended by Dr. Twiss, that the persons on board The Rob Roy, notwithstanding the extinction of the light, might have concluded that the vessel approaching them was a steamer, and under this supposition they ought to have starboarded their helm, in compliance with the admiralty regulations. In my judgment, and in that of the gentlemen by whom I am assisted, this suggestion of the learned counsel does not appear to be borne out by the circumstances of the case. The two vessels, it is to be observed, were approaching each other in opposite courses nearly end on. In such a case, *prima facie*, the general rule of navigation would be, that each vessel should put her helm to port ; and although it may be true that the light at the mast head of a steamer may be different from the lights ordinarily carried by sailing vessels, yet as such light was alone visible to The Rob Roy, it would not, in our opinion, have justified the crew of The Rob Roy in acting by anticipation upon the regulations of the admiralty, and neglecting the more generally recognized rule of navigation. We therefore think that, in porting her helm and easing her engines as she did, she adopted the measure [\* 197] which was proper to have been taken under the circumstances of the case. It remains to be considered, whether there was any delay in carrying these measures into effect, which can be charged as a ground of culpability against the master and crew of The Rob Roy. Looking to the evidence in the cause, and more particularly to the evidence of the witness Bartlett, I am most clearly of opinion that no such charge is substantiated in the present instance.

He states that on the discovery of the light, orders were given to him by the mate to port the helm, and that he kept the helm to port accordingly for a short time, not meaning that it ever ceased to be to port ; and on the fifth article, he says, that directly afterwards the master came up and directed him to port it hard-a-port, and he did so. It is impossible, under the circumstances of the case, to fix, with any legal certainty, the precise distance at which the two vessels saw each other, or the exact interval of time that elapsed before they came into collision. Looking, however, at the whole of the case, I consider that the charge of misconduct, as regards any unnecessary delay either in putting the helm a-port or reversing and easing the engines, is not substantiated by any evidence which is before the court ; on the contrary, I think that the persons on board The Rob Roy did every thing which was necessary and proper to be done, and that

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they did so in due time. This being the impression upon my own mind, and also upon that of the gentlemen by whom I am assisted, I am relieved from the necessity of entering into a consideration of the conduct of those on board The Unicorn. The master of that vessel, it appears, was in ignorance at the time whether the green [ \* 198 ] light on his \* starboard bow was burning or not, and acting upon the impression that it was so burning, gave the directions to starboard the helm, and the collision took place. I do not wish to attribute blame, or to add to the misfortune which the owners of The Unicorn have already sustained in the total loss and destruction of their vessel, I must, however, in conclusion, observe, that if these regulations of the admiralty are to be followed out, it is of the utmost importance that those on board the steamers should see that the three lights are duly lighted and kept burning, for unless this precaution is taken, it is perfectly clear that other misfortunes like the present will most probably occur.

The Trinity Masters agreeing with me in the opinion that both vessels, when they first saw each other, were nearly right ahead, and that both should have put their helms a-port, I must dismiss this action against the owners of The Rob Roy.

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### THE OSMANLI,<sup>1</sup> Corbett.

January 15, 1849.

A bond of bottomry given by the master to release his vessel from an arrest on account of debts owing by the owner to his agent at Malta, upon the balance of accounts current between them, such accounts being [chiefly] incurred anterior to the voyage in which the vessel was engaged at the time, not sustained, [except as to the items incurred for this voyage.] The general principle, that bonds of bottomry can alone be given for the furtherance of the voyage in which the vessel is actually engaged, not affected by the circumstance that by the law of the country where she is seized the vessel may be arrested and sold for any debt owing by the owner to a creditor residing in that country.<sup>2</sup>

THIS was a suit upon a bond of bottomry, promoted by Alexandria Pandia Petrochisio, against the mortgagees in possession of 62 64th parts or shares in this vessel.

On the part of the bondholder it was in substance alleged in the act on petition, "that on the 7th of March, the screw steamer Os-

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<sup>1</sup> [S. C. 7 Notes of Cases, 322.]

<sup>2</sup> [See The Vibilia, 1 W. Rob. 1.]

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manli, of 210 tons, under the command of Corbett, the master, put into Malta on her homeward voyage from Constantinople and Smyrna to Liverpool, to fill up with what \* goods [\* 199 ] might there offer, and to replenish fuel, water, and provisions.

That whilst there lying she was arrested by warrant of her Majesty's Commercial Court at Malta; and in order to release his vessel from arrest, and to procure for her the requisite fuel, provisions, and stores to enable her to proceed on her voyage, the master, being without funds or any available credit, borrowed of Rosario Messina, a merchant of Malta, the sum of 850*l.*, at a maritime premium of seven per cent., and executed a bottomry bond for that amount on the ship, her machinery, furniture, and freight; the bond to be payable the day after the arrival of the vessel at Liverpool. That the vessel arrived on the 28th March in the port of Liverpool, and that payment of the bond had been demanded by W. Petrochino, the legal holder of it, and had been refused.

The answer to the act on petition on behalf of the mortgagees of the vessel, admitting the fact of the execution of the bond, and of the indorsement thereof to Mr. Petrochino, the arrival of the ship in the port of Liverpool, and the refusal to pay the bond as pleaded, in substance alleged that the vessel, together with two other vessels called The Levantine and Aram, being at such time the property of Augustus Mongredien and Anthony Easterby, was in the month of March last employed in steam navigation to the Levant, and that the three vessels were despatched in turn from the port of Liverpool to the Levant, calling at Malta on their outward and homeward voyage for the double purpose of replenishing fuel and receiving any cargo which offered; that A. Mongredien, as the owner of 62 64th shares, had the entire management of the said vessels, and employed Messrs. Duckworth, Robinson \* & Co., merchants of [\* 200 ] Malta, as his agents and correspondents in the concerns of the said vessels.

That Messrs. Duckworth & Co. received passage and freight moneys on account of the said vessels, and made the necessary disbursements for the fuel, stores, and other expenses of the same; and from time to time transmitted to A. Mongredien an account current of these receipts and disbursements.

That on the 12th August, 1848, A. Mongredien having mortgaged to Messrs. Arnold, Roscoe & Co., of Liverpool, all his 62 64th shares or parts in The Osmanli, the mortgage was duly registered at the custom-house at Liverpool, on the 30th October, 1845, and was indorsed on the certificate of the ship's register on the same day; that The Osmanli, in the prosecution of her voyage from Constantinople to

Liverpool, on the 7th of March last arrived at Malta, and E. H. Corbett, the master, sent a note, shortly after his arrival, to Messrs. Duckworth & Co., requesting them to make the needful arrangements for a supply of coals, and for the disbursements of the ship; and, in answer to such note, the master received a verbal answer from Mr. Leonard, the managing partner in the firm of Duckworth & Co., that the coals required should be sent on board in the course of two hours; that, instead thereof, about 10 o'clock of the same morning, the master was served with a copy of a warrant arresting his ship, at the suit of Messrs. Duckworth & Co., the said warrant purporting to have been taken out for the liquidation of certain unsettled accounts outstanding against Mongredien in the books of the firm of Duckworth & Co., for balance of accounts current between them arising [ \* 201 ] from provisions furnished and disbursements \* made by them in the agency and management of the vessel at Malta.

That the master, having been served with a copy of the warrant, sent another note to the firm of Duckworth & Co., requesting the managing partner, Mr. Leonard, to meet him at the quarantine office, and that an interview took place accordingly at 3 P. M. of the same day; that upon the master inquiring the meaning of the arrest, he was informed by Mr. Leonard, that it was for debts due to the firm from the Levant Steam Company, not on account of The Osmanli alone, but of all the vessels; and upon the master expressing his opinion that it was not legal to detain his vessel for the other vessel's debts, Mr. Leonard replied that he was acting under the advice of his solicitor, and that until the claims were liquidated the ship could not go to sea; that on the following morning a meeting again took place between Mr. Leonard and the master of The Osmanli, at which it was agreed that a bond of bottomry should be given on the vessel, &c., in favor of Messrs. Duckworth & Co., to the extent of their claims and any further disbursements they might make for the supply of the ship; but this arrangement was afterwards altered, and it was arranged that the necessary funds should be advanced by a third party, and the bond should be executed in his favor, Mr. Leonard undertaking to find the party in question; that a further meeting, for the purpose of carrying out these arrangements, took place in the course of the same day at the office of W. T. Stevens, a notary employed by Messrs. Duckworth & Co., and upon that occasion Rosario Messina, a merchant of La Valetta, was introduced to the [ \* 202 ] master by Mr. Leonard, as prepared to lend the \* money on bottomry; that, previous to the arrival of the said Messina, a bottomry bond had been prepared, with blanks left therein for the name of the party in whose favor it was to be given, and for the

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amount of the principal sum to be advanced, and the interest; and Mr. Leonard having estimated that the amount of the debt owing to Messrs. Duckworth & Co., together with the funds necessary for the supply of coals, and other expenses of the vessel, would exceed the sum of 800*l.*, suggested that the sum to be advanced should be 850*l.*, and that any surplus should be handed over to the master for the service of the ship; that, upon the arrival of Mr. Messina, the blanks were accordingly filled up, and the master signed the bond, at the same time protesting against the rate of interest demanded, as usurious; that when the bond was so executed, Messina handed to the master a check for 850*l.*, who delivered the same to Mr. Leonard; that the coals required for the service of the ship were subsequently sent on board, and on the same evening Mr. Leonard gave to the master the accounts current between his firm and the Levant Steam Company, and also handed to him the sum of 59*l.* 14*s.* 8*d.*, being, as he alleged, the balance due to him on the said bond.

That the master, upon receiving the accounts, expressed his inability to check the same, and told Mr. Leonard that it must be done upon the arrival of the ship in England; that no part of such accounts was owing in respect of The Osmanli, on the homeward voyage in which she was engaged at the time of her arrest, but that the whole of the balance claimed to be due was in respect of the steam-vessels Levantine and Aram, and for former voyages of The Osmanli; that the outward and homeward voyage of The

\* Osmanli were separate and distinct voyages,—the out- [\* 203 ] ward voyage being completed on the landing of her passengers and the delivery of her cargo at Constantinople, and the homeward voyage terminating in like manner at Liverpool.

That, under the circumstances of the case, the arrest of the vessel in the first instance by Messrs. Duckworth & Co. was illegal, and that the master was not justified in giving a bond of bottomry for debts incurred by other ships, or for debts incurred by his own vessel in other voyages than the one in which he was engaged.

The reply on the part of the bondholders, in reference to the legality of the arrest of the vessel by Messrs. Duckworth, in substance pleaded, that, by the law of Malta, a creditor has a lien upon all property whatsoever of a debtor, and that a vessel may be legally arrested and sold at the suit of a creditor of her owner for any debt due from him, although such vessel may not be in any manner specially affected in such debt, and although the debt, if incurred on account of the ship, was incurred in former voyages of the same; that on the arrival of The Osmanli at Malta, Mr. Mongredien being indebted to the firm of Duckworth & Co., Mr. Leonard, as the managing partner, made



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an affidavit to lead the warrant of arrest, expressly stating that the debt claimed was incurred on account of all the vessels belonging to Mongredien, and the warrant was issued by the judge with a full knowledge that such was the nature of the asserted claim. The reply then denied that, at the first interview between the master and Mr. Leonard, any suggestion was made as stated, that a third party should be found to make the advance of the money, and take the

bond, and that such third party should be found by Mr. Leonard. [ \* 204 ] \* On the contrary, that the master, by the advice of an advocate at Malta, to whom he had applied, was recommended to take up money on bottomry to release his vessel ; that he employed a regular agent of his own to procure the advance so required ; and after applying in vain to several merchants at Malta, Messina was the only person whom the agent found willing to lend his money, and was introduced by him to the master ; that Messina was expressly informed that the money to be advanced was required for the purpose of releasing the vessel from arrest, and to procure fresh provisions, &c., to enable her to proceed on her voyage ; that, at the time of the preparation of the bond, the notary of Duckworth & Co., who drew it up, was assisted by the advocate and professional adviser of the master, and the bond was executed in the presence of such advocate, and he is one of the attesting witnesses to the same.

In the rejoinder, it was denied that any agent was employed by the master in negotiating the advance of the money required, and that any application was generally made to the merchants at Malta for the sum, as stated ; on the contrary, that, throughout the whole of the transaction, Mr. Leonard, by himself and his agents, managed the negotiation in question, and that Joseph Manno, mentioned in the reply, acted as such agent, and not as the agent of the master.

A surrejoinder was given in, counterpleading that Manno in any way acted as the servant or the agent of Mr. Leonard.

The case was argued by

*Jenner and Bayford*, for the bondholder.

[ \* 205 ] \* *Robinson and Twiss, contra.*

#### JUDGMENT.

This suit is brought by the holders of a bottomry bond executed at Malta against the vessel called the *Osmanli*, a steamer employed in the Levant trade. The action is defended by the firm of *Arnold & Co.*, who allege themselves to be mortgagees in possession of 62 64th shares in the vessel. The bond bears date the 9th of March 1849,

and it is stated, in the act on petition, that Corbett, the master, who executed the bond, was the owner of 2 64th shares, but this appears to be a mistake. The maritime interest is seven per cent., and the sum total due upon the bond is 909*l.* 10*s.* The vessel, when she so put into Malta, was on a voyage from Constantinople to Liverpool. The reason alleged for the execution of the bond is, that the vessel was arrested by the marshal of a court at Malta, and that, in order to release her from such arrest, and procure the requisite provisions and stores to enable her to proceed to Liverpool, the bond was granted on the ship and freight; and it is also further expressly averred, that unless the money had been so advanced, the ship could not have left Malta. On referring to the bond, I find it stated that this warrant of arrest issued at the suit of Robinson, Duckworth & Co., merchants of Malta, creditors not only of the vessel but of other vessels belonging to the same line and the same owners.

The defence contained in the answer of the mortgagees states the history of various transactions, to which I must necessarily advert in some detail. It is alleged that this vessel, the *Osmanli*, together with two other vessels, were the property of Augustus Mongredien, Peter Borrie, and Anthony Easterby; \* 59 64th shares [ \* 206 ] belonging to Mongredien, 3 64th shares to Borrie, and 2 64th shares to Easterby. That these three vessels were employed in the Levant trade from 1847, and up to the date of this transaction, calling at Malta on the voyages out and home, each voyage being distinct and separate; that in 1848 Mongredien purchased Borrie's three shares; that Easterby continues to hold the other 2 64th shares, and is resident in South America; that Robinson, Duckworth & Co., were the agents of Mongredien at Malta, and received freights and provided fuel and stores for these vessels on their several voyages. The answer then sets forth the mortgages, into which I do not think it necessary to enter particularly, because the fact is not disputed in the cause. It further appears that The *Osmanli* left Liverpool on the 12th of January, 1848, and Mongredien became bankrupt on the 10th day of February following. The *Osmanli* reached Malta, on her return voyage, on the 7th of March, at six, A. M. The master sent a note to a partner in the firm of Robinson & Co., alluding to the failure of Mongredien, and requesting him to arrange for a supply of coals and small stores for the voyage home. This note is not produced. The answer to it was verbal, that the coals should be sent on board in two hours; at 10, A. M., the ship was arrested at the suit of Robinson & Co., for the balance of accounts with Mongredien, as the manager of these three steam-vessels. Here follows a long and detailed statement to the effect that the bond was originally intended

to be granted to Robinson & Co., but that, at the instance of their advisers, it was determined by them that another person should be found to advance the money; that the bond was not ready [ \*207 ] till the \* afternoon of the 9th; that previous to the execution the coals and small stores were sent on board; that Mr. Leonard, the managing partner of Messrs. Robinson, on being asked by the master for what amount the bond should be taken, answered that the accounts were not yet made up; that, including the expense of the coals and stores, the amount would exceed 800*l.*, and that the bond should be taken for 850*l.*, and any surplus should be paid over to the master; that at the time of the execution of the bond, the check for payment was delivered over to Robinson & Co.; that, two hours afterwards, Leonard handed over to the master the accounts, and a balance of 59*l.*, 14*s.* 8*d.*, which included certain other sums received by Robinson & Co. on account of the ship. These accounts must be the subject of observation hereafter. The answer then concludes by stating that the debt due to Messrs. Arnold & Co. was a specialty debt; that the arrest of the vessel was illegal; that the master was not justified in giving the bond to cover debts for other ships, or for the former voyages of the Osmanli. Considering all these facts and averments, the answer ends with rather a singular prayer, namely, that, before pronouncing for the validity of the bond or otherwise, the court should disallow certain charges in the accounts. This prayer is, as far as I know, without precedent. The court is asked, as a preliminary question, to take a part of the accounts into consideration, reserving the validity or invalidity of the bond, a question which would be wholly disposed of, if I pronounced against the validity of the bond, and which, if I pronounced for the validity of the bond, would, according to the ordinary course of proceeding in this court, be referred in the first instance to the [ \*208 ] registrar and merchants; a question, \* too, which, if it was intended to admit the validity of the bond generally, has been most unnecessarily encumbered. Such prayer and course of proceeding lead to confusion, and should be avoided in future.

The reply asserts, first, the legality of the arrest; secondly, that Leonard did not undertake to find a person to advance the money on bottomry; that the master consulted with a Dr. Caruana, who advised him to take up money on bottomry; that the master employed an agent, by whose means Mr. Messina, a merchant and banker, undertook to advance the money; that he knew the purposes for which the money was to be raised; that at the execution of the bond, the master was attended by Dr. Caruana, and was advised by him; that the money was advanced without any understanding with

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Robinson & Co.; that when the money was so advanced, Messina, and Robinson & Co. were ignorant of the mortgage. The rejoinder denies the alleged advice given by Caruana; it also denies that any agent or mediator was employed, and alleges again that the whole transaction was conducted by Leonard and his servant Manno. The rejoinder denies that Manno was the servant or agent of Messrs. Robinson & Co. Such are the contents of the pleadings, and I must now look to the evidence to ascertain which and how much of these statements are supported by the evidence, and so trace, as clearly as I can, the real state of facts, with reference to which any questions of law arise. The first fact of importance is admitted to be true, as it is also proved by the accounts, namely, that, except for the sum of 150*l.*, the whole amount for which this bond is given, is the debt due to Messrs. Robinson & Co. for past transactions, for debts owing to them as agents, for advances of various kinds made on  
\* account of ships under the management of Mongredien, [ \* 209 ] engaged in the Levant trade in former voyages, and of which ships The Osmanli was one. The next fact is, that it appears by the certificate of registry, that the mortgage of Messrs. Cunliffe & Co. was indorsed upon the certificate. The third circumstance of importance is the legality of the arrest of this vessel. It is proved incontestibly, as I think, that she was arrested by a warrant from a competent court, and that on account of debts due to Messrs. Robinson & Co., but there is no evidence to satisfy my mind as to what would have been the decision if the whole case had been brought, or could have been brought, before a competent court at Malta, which case, if so brought, would have included the facts of the bankruptcy of the owners of nearly the whole property in the ship and the previous mortgage of the vessel. Fourthly, with regard to the advance of the money by Messina, I must, in the first instance, refer to the affidavit of Messina himself, the affidavit marked No. 1. No doubt, in many respects, this affidavit confirms the statement in the act. Messina admits that he was aware that the money was advanced in part to release the ship from the arrest of Messrs. Robinson & Co.; for what debt, or why, or wherefore, the warrant of arrest was issued, he did not, as it would appear, trouble himself to inquire. He states that he agreed to advance the money at the instance of one Geuseppe Manno; he negatives all request and solicitation on the part of Messrs. Robinson & Co., but it is to be remarked, and it is somewhat remarkable, that he does not negative any previous communication with them. The next affidavit, marked No. 2, is made by Joseph Manno, and before I proceed to consider its contents, I must observe, that it \* is quite apparent from this and other [ \* 210 ]

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affidavits in the cause, that either Messina or Robinson & Co. have the control over the makers of the affidavits at Malta, for several of them who come forward to make the affidavits in support of the bond are the very persons who, under ordinary circumstances, would be expected to appear on the other side. In such a state of things as this, the vigilance of the court must be exercised. Manno deposes that he was employed by the master; that he introduced him to his advocate, Dr. Caruana, and that by desire of both the master and Caruana, he went round to several merchants to obtain a loan on bottomry, and finally induced Messina to advance the money. The affidavit of Caruana, No. 3, is, as far as relates to his part in the transaction, to the same effect; the remainder of the evidence relates to the usage as to bottomry, and to the law of Malta. I will now turn to the evidence of the mortgagees. The affidavits A. and B. relate to facts which are not disputed. There are also two affidavits from the master which are marked C. & D. It appears to me that the facts deposed to in these affidavits do not materially vary from the statements which are made on behalf of the bondholder. The principal difference is, as to whether Leonard, by himself or his agent, procured the advances on bottomry, or whether Manno, as the agent of the master, did so, a difference which I do not think will be found of great importance in the ultimate decision of this case. From these statements, then, and from this evidence, I draw the following conclusions:

First, that The Osmanli was arrested for debts due from Mongre-dien, on account of advances for The Osmanli on former [ \* 211 ] voyages, and for other ships of the \* same owner, and that the arrest did not and could not include the 150*l.* subsequently advanced for coals and other articles.

Secondly, that the arrest was according to the law of Malta, so far as appears legal; but that the ultimate consequences of such arrest, if all the facts of the case had been brought before the court at Malta, and all the conflicting claims fully discussed, are not and cannot be known from the proceedings in this cause.

Thirdly, that Messina advanced the money on bottomry, knowing that it was to be applied to pay debts due to Messrs. Robinson & Co., and to release the ship from the arrest imposed at their instance. He may have been ignorant of the mortgage; but, assuming him to have been so of the fact of the mortgage, I am of opinion that he is not released from the effects of a knowledge thereof, because the mortgage is indorsed on the certificate of registry, to which he, by himself or agent, might have had access.

Fourthly, that it may be doubtful, on the evidence, whether this

advance was made by the intervention of a partner in the house of Robinson & Co., or an agent of the master, but that such fact is really of no great importance; for, assuming the statement of the bondholder to be true, no doubt can exist that Robinson & Co. forced upon the master a loan on bottomry, and it matters little, under all the circumstances of the case, whether they applied to Messina, or compelled the master to do so.

Fifthly, it appears to me that no moral fraud is imputable to any of the parties concerned in this transaction. If the law of Malta gives particular remedies by arrest or otherwise against a debtor or his property, I see no reason why the creditor, \*resi- [ \* 212 ] dent within the Maltese jurisdiction, should not avail himself of it. A merchant resident in Malta, advancing his money on bottomry, in aid, if I may so express myself, of the remedies afforded by the jurisdiction of that island, is equally free from all moral blame. I need not add, that however *bonâ fide* such proceedings may have been, all parties must of course abide by the legal consequences. I have gone at great length into these particulars, especially with a view to satisfy the parties concerned in this suit that I have bestowed full attention upon the case, which, in some respects, is a novel case. I now proceed to the legal conclusion, which I have formed from the premises and those facts which I consider established. I will first look at the case as if there were no mortgage, no bankruptcy, no arrest. In this view of the case, it is as clear as daylight that, removing these three ingredients, no bottomry bond could have been legally taken for the debts for which it was taken in the present instance; it is contrary to all principle hitherto laid down, that a master could legally execute a bottomry bond to cover advances on a former voyage, or for debts arising from supplies and necessities furnished to other ships, though belonging to the same owner. Then the first and most important question of law which suggests itself, is this, whether the fact of the arrest, on account of the debts I have described, justifies the master in executing a bottomry bond to release the vessel, so that such bond shall be valid and legal. Let us consider what would be the consequence of affirming or negating this proposition, and first the consequence of negating it. No doubt a ship with a valuable cargo might be detained at a foreign port, to the great injury of the ship-owner, and perhaps damage to the cargo, from its postponed \* arrival at the port of destination.. On whom would [ \* 213 ] this loss fall? I apprehend upon the ship-owner, who must bear his own loss, from having incurred debts without providing adequate means for their liquidation; he must also bear the loss which falls upon the cargo, for not having conveyed it according to his con-



tract; for the arrest of his ship on account of his own debts could never be a defence to a breach of his own contract.

We will now look at the consequence of affirming the validity of a bond given under such circumstances, and first as to the ship-owners. As, by the law of Malta, it is said that a ship might be arrested for all accounts current, so debts contracted on personal credit may, without any investigation, be actually paid through the medium of a bottomry bond; and if the accounts were erroneous, there would be no remedy but a suit in Malta, and it might be against insolvent persons. Such a doctrine would, I think, probably lead to the frequent arrest of British vessels in foreign ports, and would not be to the advantage of the ship-owners of this country. But what would be the consequence to the mercantile interest in general?—to the owners of cargoes shipped on board British vessels? If, under the circumstances described, a valid bond could be given on the ship and freight, might not the cargo be included also? Could it now be maintained as a legal proposition, that a ship and freight might be the subject of bottomry, and not the cargo? Might not Mr. Messina, in this case have required, with the same legal justice, that the cargo should be included in the bond? I have not heard that position attempted to be maintained, and, indeed, I could not expect that it would, for I

apprehend that all the authorities since the case of *The* [\* 214] *Gratitudine*,<sup>1</sup> and the whole course of practice in this court, show, that, when the ship and freight may be the subject of bottomry, so may the cargo also; and the circumstance of the arrest of the ship on account of the debts of the owners, can form no exception; for where the ship is detained, the cargo is equally detained, whatever be the cause of detention. Then, if this be so, a cargo belonging to a British merchant, however valuable, may be made the subject of bottomry for any debts due by the owner of the vessel, where by law the power of arresting the vessel exists, if the bond be valid, the owner of the cargo must pay it, and to what amount? Not merely to the amount of the costs of provisions, necessaries, and repairs, but any sum on account of which the ship may be detained, whatever the amount of debt may be, and what remedy has the owner of the cargo? Suppose the owner of the ship insolvent, as he is not unlikely to be, if he is in debt in a foreign port, and without credit, unless some distinction could be drawn as to the right of subjecting the ship to bottomry, and not the cargo, it appears to me that, by pronouncing for the validity of the bond, I should esta-

<sup>1</sup> [3 C. Rob. 240.]

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lish a principle which might be very detrimental to the interest of the mercantile community, and which would lead to consequences infinitely more serious than the occasional detention of a cargo by the arrest of the ship. The next inquiry is, whether there be any authority in favor of the validity of a bond so granted. So far from there being any authority, I believe that this is the very first time in which such a proposition has been mooted. It is true that the question may have been discussed, though not, as far as I know, decided, whether a bottomry bond could be granted on account of the ship being arrested for debts incurred originally on personal security \*for the repairs and necessaries on that very voyage. I [ \*215 ] know of no case where it has been decided, or even contended, that a bottomry bond could be granted on account of the arrest of the vessel for old debts. Several cases were cited in the course of the argument, but there is not one of them, it appears to me, when I come to look at the circumstances of each case, that has any direct bearing upon the question. In the case of *The Prince George*,<sup>1</sup> which went up to the Privy Council, the debts were incurred in the very voyage on which the ship was engaged. In the course of the judgment, delivered by Lord Campbell in that case, it is true the learned judge delivered himself to the effect cited by the counsel of the bondholder. If it had been proved, he said, that the law of New York gave the lien upon the ship, as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money, which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship. This power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable; and it seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties. It is due in justice to the noble lord who delivered the decision of *The Prince George*, that the expression which he here uses should be taken in reference to the peculiar circumstances of that case; not as laying down a universal proposition of this immense importance for the first time, and without a due consideration of the principles and authorities which are applicable to it. In the case of *The Augusta*,<sup>2</sup> which was also cited, all that Lord Stowell decided was this, namely, that where \*an agent had advanced money or [ \*216 ] incurred debts upon personal security to a certain extent, it was competent for him to withhold such further advances on the same

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<sup>1</sup> [4 Moore, P. C. Rep. 21.]

<sup>2</sup> [2 Dod. 283.]

security, and say, "I will advance no more money on personal security, and I will require a bottomry bond as my security for further advances." This is, in truth, the sum total of the decision in that case. It is very true that, in the course of the discussion in that case, an argument incidentally arose as to the power or as to the right of a creditor to detain the vessel according to the law of the country where she was then lying. Lord Stowell, in allusion to this feature in the cause, said to this effect:—"It has been said that the party might, by the law of Russia, have detained this ship till the money was repaid, but I do not think that circumstance alone will be sufficient to convert this into a case of hypothecation. Ships might in all cases be detained on the same ground by the general law of Europe, and if the position which has been laid down were to be supported, it would go the length of turning every case into a case of hypothecation, or, at least, there would be a necessity of inquiring in every case into the state of the foreign law. Surely, it never could have been intended, by the judgment in *The Prince George*, to overturn the judgment in *The Augusta*, at least without a somewhat fuller discussion of the important principle laid down by Lord Stowell. It is unnecessary for me to travel further into the authority of decided cases, because there is a broad and wide distinction between former cases which have occurred and the case we are now considering. The question in this case is, not whether the advances were originally made on personal security, for the benefit of the vessel on [ \* 217 ] the voyage in which she was engaged; nor \* whether the creditor, having the power to arrest the vessel for these identical advances, may take a bottomry bond in release of his lien. The question here is, whether a bottomry bond might lawfully be granted to cover antecedent debts. There is, I repeat, a broad and wide distinction between the cases, and I should, I conceive, be expending time unnecessarily by going into the general principles laid down in the text-books upon which the law of bottomry is founded. One and all of these lay down the doctrine over and over again, that advances, which may become the subject of bottomry, must be advances made for the services of the ship during the particular voyage in which she is engaged. Both the general doctrines of the text-books, and those laid down by Lord Stowell and other judges who have preceded me in this chair, militate against the contrary proposition. It may be that they have not directly expressed their opinion in words; for it never, I apprehend, entered into their minds that a case of the present description would arise. They, however, describe the circumstances under which bottomry can lawfully take place, and, in so doing, by necessary inference, exclude the present case.

For these reasons I am of opinion that this bond cannot be supported on the ground of the advances being made for the release of the vessel for former debts and liabilities of the owner. Another question still remains to be decided, namely, whether the bond is valid in regard to the supplies furnished and the advances made subsequent to the arrival of the ship at Malta, in March, 1849.

The case of *The Augusta* and other cases undoubtedly establish that a bond may be valid for a part of the moneys borrowed ; that an agent may \* discontinue to advance his money upon [ \* 218 ] personal credit, and take from the master a bottomry bond for advances subsequently supplied. How stands this case in reference to those principles? Robinson & Co. were the general agents of Mongredien, and on being informed of his bankruptcy they had a perfect right to refuse all supplies on personal credit. How did they act? The vessel was arrested on the 7th of March, and according to the affidavit of Mr. Leonard, was so arrested for a balance of accounts. Now, these supplies were not then furnished, consequently the arrest has nothing to do with this 150*l.* ; it is wholly independent of it. The ship was not detained for the cost of these supplies. According to the master's affidavit, Messrs. Robinson & Co., when applied to for the coals and supplies, sent word they should be sent on board in two hours ; not a word was said at that time of refusal to act as they had done before nor of any demand for a bottomry bond, though no doubt it would have been quite competent to Messrs. Robinson & Co. to have refused, and at that time to have required a bond for the amount of such supplies. It further appears that the master consented to give a bond, though it does not appear for what amount, and he agreed to give such bond before the coals and supplies were put on board ; that they were furnished before the bond was executed ; and that Messina knew that the bond was to cover the costs thereof. It was not to be expected, when the bankruptcy of Mongredien was known, that Messrs. Robinson & Co., or any one else, would furnish supplies on personal credit. It appears to me, therefore, that the cost of these supplies was a proper subject for bottomry ; and I think I am justified in pronouncing for the validity of the bond to that \* extent. I am not, however, [ \* 219 ] prepared to say that in all cases where a small amount of the sum claimed is properly a subject of bottomry, and the larger proportion of the demand is not properly the subject of a bond, that the court would be under the necessity of pronouncing for that smaller amount. Such a practice might lead to fraud, inconvenience, and litigation.

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The Bold Buccleugh. 3 W. Rob.

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In the foregoing observations which I have made in delivering my judgment, I have not noticed the mortgage or the bankruptcy for several reasons; and I do not think it necessary for the decision to which I have come, that I should now advert to it. Indeed, I am inclined to think that I could not with propriety have entered into the questions which might have been involved in the consideration of those facts of the case, but that they must have been left to other courts. I pronounce for the bond so far as it is prospective, and against its validity so far as it is retrospective. So far as it is prospective it does no injury to any right the mortgagees have in the vessel, because their right as mortgagees could never put them in a better position than the owner could have been in, and he had a perfect right to hypothecate her for the purpose of raising the supplies which were necessary to bring her from Malta. With respect to the costs, both parties are in strictness liable, according as they have succeeded or failed in the suit. I shall, however, give no costs at all; for I think an attempt to divide these costs upon principles of equity would entail upon the registrar a task which he would have great difficulty in satisfactorily accomplishing.

I pronounce for the bond, so far as relates to the costs of the supplies furnished subsequent to the 7th of March, and against it as to the remainder.

[ \* 220 ]

\* THE BOLD BUCCLEUGH.<sup>1</sup>

January 18, 1850.

A suit having been commenced against a vessel in the Court of Session, in Scotland, for damages by collision in the river Humber, the vessel was arrested under process of that court, and was released upon bail.

During the pending of the proceedings in the Court of Session, the vessel having come to the port of Hull was arrested under process of the High Court of Admiralty of England, and proceedings were commenced in that court for the same collision, instructions being sent to the law agents of the plaintiffs in the Court of Session to discontinue and abandon the proceedings in that court.

*Held*, that the proceedings in Scotland had been virtually abandoned by such intimation of the plaintiff's intention, although the cause before the Court of Session was not formally dismissed at the time of the second arrest of the vessel.

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<sup>1</sup> [S. C. 2 Law & Eq. Rep. 540, and 7 Notes of Cases, 433.]

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The Bold Buccleugh. 3 W. Rob.

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Plea of *lis alibi pendens*, in objection to the court's jurisdiction in the second action, overruled.

THIS was a cause of damage, promoted by the owners, the master and crew of the bark William, against the steam-ship The Bold Buccleugh. The collision took place in the river Humber, on the 14th December, 1848, and on the 19th of December an action was entered in the Court of Admiralty on behalf of the owners of The William, and a warrant of arrest was extracted and was forwarded to Hull to be executed. Previous to the arrival of the warrant at Hull, The Bold Buccleugh had left that port for Leith, and consequently she could not be arrested. The owners of The William then applied to the owners of The Bold Buccleugh to give bail to the action entered in this court, which they declined to do, and The Bold Buccleugh still continuing out of the jurisdiction of this court, and within the jurisdiction of the courts of Scotland, the owners of The William, who were resident in this country, commenced a suit against the owners of The Bold Buccleugh in the Court of Session in Scotland, and the vessel was arrested and bail was given to answer the action in that court. In the latter end of August, 1849, whilst the proceedings were still pending in the Court of Session in Scotland, The Bold Buccleugh, having returned to Hull, was again arrested by virtue of a warrant under seal of the High Court of Admiralty, and a fresh action was in that court commenced, instructions being sent to Scotland for the immediate abandonment of the suit in the Court of Session.

An appearance was given under protest by the owners of The Bold Buccleugh, and an act on petition having been brought in on his behalf, disclaiming \* the jurisdiction of the Court [ \* 221 ] of Admiralty to entertain the second suit, the said act on petition now came on for argument.

The act on petition alleged, that on or about the 30th of January, 1849, a suit was commenced in the Court of Session, in Scotland, on behalf of the owners of The William, against the Edinburgh and Dundee Steam Packet Company, the then owners of the steam-ship The Bold Buccleugh, in order to obtain compensation for the loss sustained by them in respect of the bark having been run down by The Bold Buccleugh and totally lost. That in pursuance of the writ of summons issued in the said suit, The Bold Buccleugh was arrested, but bail having been given on behalf of the owners, she was released. That the said suit, and also a suit instituted in the same court by the owners of the cargo laden on board The William against the owners of The Bold Buccleugh, are still pending in the Court of Session, in Scotland, and are expected to come on for hearing in that court in the



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month of December next, and that the pretended cause of action in this suit is the same as in the said suit now pending in the Court of Session, in Scotland. That on or about the 26th of June, 1849, the then owners of The Bold Buccleugh sold and absolutely conveyed to Daniel Horner, the present owner of the said steam-ship, the said vessel, her tackle, apparel, and furniture.

The answer on behalf of the owners of The William alleged, that the said bark having been sunk at her anchor in the river Humber, on the night of the 14th December, 1848, by the steam-ship The Bold Buccleugh, which was then and for some time previous thereto had been trading between the ports of Leith, in North Britain, [ \* 222 ] and Kingston-upon-Hull, \* an action was entered in the Court of Admiralty, in the month of December, against the said steam-ship in a cause of damage by the owners of The William, in respect of the loss they had sustained, and a warrant under seal of the court was on the same day extracted and forwarded to Kingston-upon-Hull for the purpose of being there executed upon the said steam-ship, but which had quitted the said port before the arrival there of the said warrant of arrest, and whereupon, whether by accident or design, the said steam-ship never came, or was suffered to come, within the jurisdiction of the Court of Admiralty, at least to the knowledge of the owners of the said bark, so that the said steam-ship could not be arrested by the authority of the court, and the owners of the said steam-ship, when applied to, refused to appear and give bail to the action so entered against them. That thereupon the suit was commenced in the Court of Session, in Scotland, and for a time was prosecuted there in the manner aforesaid ; but that such suit is not still pending, or at least being proceeded with there as alleged ; on the contrary, that the said steam-ship having, in the month of August last, arrived in the port of Hull, the owners of The William, on being informed thereof, immediately caused a second warrant for her arrest to be obtained and executed against her, being the earliest period at which the said steam-ship could be arrested, and whereupon the said owners abandoned absolutely, and caused to be discontinued, the suit so of necessity commenced by them in the Court of Session, in Scotland, and in which court accordingly there is no longer any suit pending. That the present owners of The Bold Buccleugh, at the time of the purchase of the said steam-ship from her former owners, well [ \* 223 ] \* knew of the unsatisfied claim outstanding against her on account of the damage done to the late bark William, and did provide or might have provided accordingly.

A reply was given in, pleading that the present owner of The Bold

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Buccleugh, being advised that he had an interest to oppose the dismissal of the suit in the Court of Session in Scotland, on the 6th of November instant, being the day on which the warrant was given in, the agent for the defenders in the said suit alleged in court before the judges then present, that the defenders had an interest to oppose the motion for leave to abandon the suit, and intended to assist another party, to wit, the present owner of The Bold Buccleugh, interested to maintain the defence; whereupon the said judges allowed the defenders to put in a minute of answer between that day and Thursday, the 8th day of the said month, and also a minute professing to assist the then new defender referred to. That on Friday, the 9th of the said month, in consequence of the defender having failed to lodge any minute as aforesaid, the court dismissed the action, but that such order of dismissal is not final, and that the agent of the defender has lodged an application to the court to recall the same, and grant permission to them to state the grounds upon which the present owner of The Bold Buccleugh contends that he has a sufficient interest to oppose the said dismissal, and that the dismissal or otherwise of the said suit remains subject to the order of the court, to be made in the matter of the said application. That the present owner of The Bold Buccleugh was not aware, at the time of the purchase by him of the said steam-ship, that there was any unsatisfied claim outstanding against her, on account of the damage \*sustained [ \* 224 ] by The William, or on any other account, or did provide or could have provided accordingly.

The rejoinder alleged, in reference to the averment, that the order of dismissal of the Court of Session in Scotland is not final, &c., that the application to the court in Scotland had not only been made by the defenders, but had been granted, and that the said defenders, having complied with the orders of the said court in reference to the lodging of the minutes, the question of the dismissal of the said suit was, on the 6th of December instant, fully argued before the said court, and the said suit was then and there finally dismissed.

In support of the act on petition,

*Haggard and Jenner* submitted,

That it was contrary to the first principles of justice, and to the usage of all courts, that a party should be sued in the same cause and upon the same subject-matter at one and the same time in different courts, having competent jurisdiction to entertain the suit. That the admiralty jurisdiction in Scotland had been transferred to the Court of Session in that country, and at the time when the second warrant was extracted, and The Bold Buccleugh was arrested for the

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damage in question, proceedings had been commenced against The Bold Buccleugh in the Court of Session, and had not been finally determined; there was therefore a *lis alibi pendens* upon the matter of the collision in question, in a court of competent jurisdiction to entertain the same. That, subsequent to the commencement of the proceedings in Scotland, and prior to the arrest of the vessel at Hull, the vessel had been purchased, and the property therein had [ \* 225 ] been absolutely and *\* bonâ fide* transferred to Mr. Harmer, the present proprietor. That at the time of the purchase Mr. H. was not aware of any outstanding liability against The Bold Buccleugh on account of the collision in question, and as against him it would be a great hardship that he should be disturbed in the enjoyment of the property he had so purchased, and should be saddled with the consequences of a misfeasance committed by the vessel at a time when he was not the owner of the same, and had no voice in the appointment or control over the master and crew, by whom she was at such time navigated.

*Addams and Robinson, contra.*

That the transfer of the vessel to Mr. H., however *bonâ fide* the purchase might have been, could not alter or avoid the nature and extent of the liability which attached upon her on account of the collision for which she had been arrested. That the damage sustained by the owners of The William in that collision gave them a lien upon The Bold Buccleugh to the extent of that damage, and if the new purchaser had been imposed upon, or the fact of the collision had been designedly kept back from his knowledge, he must look for his redress by proceeding against the former owners in an action at law. That, with respect to the proceedings in the Court of Session, notice of the intended abandonment of these proceedings had been given immediately upon the arrest of The Bold Buccleugh, and the necessary instructions were sent to the law agent of the owners of The William in Scotland for the final abandonment of these instructions. That by the notice given in the Court of Session by such agent, in pursuance of these instructions, the suit in that [ \* 226 ] \* court had virtually dropped, and consequently that the plea of a *lis alibi pendens* was not established, so as to debar the Court of Admiralty from entertaining the suit in the present instance.

JUDGMENT.

In this case a collision took place between this vessel and a vessel named The William, by which the latter was sunk and totally lost.

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The Bold Buccleugh. 3 W. Rob.

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The collision occurred in the river Humber, on the night of the 14th December, 1848, The Bold Buccleugh at that time trading between Leith and Hull; and on the 19th of December, five days after the accident, an action was entered in this court on behalf of the owners of The William, and a warrant of arrest was extracted, and was sent down to Hull to be executed. Previous to the arrival of the warrant at Hull, The Bold Buccleugh had left that port, and returned to Scotland, and being without the jurisdiction of the Court, she could not be arrested. An application was then made by the owners of The William to the owners of The Bold Buccleugh to give bail to the action, but this they declined to do, and The Bold Buccleugh still continuing out of the jurisdiction of this court, the owners of The William, who it seems were resident in this country, commenced a suit against the steamer in the courts of Scotland, and the steamer was arrested, and bail was given to answer the action in these courts. In the month of August last, The Bold Buccleugh having returned to the port of Hull, was again arrested under the warrant of this court, and her owners have now appeared to the action under protest, and an act on petition has been given in, and argued on their behalf. The matters contained in this act on petition are not, strictly speaking, \* matters on which to found a protest, the aver- [ \* 227 ] \* ments contained in it being more correctly in the nature of pleas in bar to estop the exercise of an admitted jurisdiction; at the same time, as this mode of proceeding is, I think, a convenient one, it does not materially signify what name is given to it. The contents of the protest, briefly expressed, are these:—First, that at the time of the second arrest there was a *lis alibi pendens*; secondly, that the ship was sold by the original owners in the month of June, 1849, prior to her second arrest under the authority of this court.

With respect to the first ground of defence, it is quite true, as a matter of fact, that at the time of the commencement of the second suit there was a *lis pendens* in the courts in Scotland; and it is also equally true, upon general principle, that the court would not allow two suits for the same cause of action to be maintained at the same time before different courts of competent jurisdiction. There are, however, some peculiarities in the circumstances of the present case, which require to be more particularly considered. It has been said, and in some respects it may be truly said, that the action against the owners of The Bold Buccleugh is in the nature of a transitory action. The observation, however, does not exactly hold good in relation to this court; because the action originally arose within this court's jurisdiction. The vessel at the time of the collision was within this kingdom, and consequently within the jurisdiction of this court.

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The Bold Buccleugh. 3 W. Rob.

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From that jurisdiction, and also from her usual occupation, she was withdrawn by her owners at the moment when the jurisdiction of this court was attempted to be exercised upon her, and the result was, that the owners of The William were compelled to proceed [ \* 228 ] in the courts of \* Scotland. I do not mean to say that they were unduly compelled so to proceed, because the Scottish owners of The Bold Buccleugh had a right, if they could, to restrict the litigation to their own courts. Still less do I mean to suggest that perfect justice might not be had before the Scotch tribunals. Be this as it may, the fact is, that the cause in the first instance was removed from what was the original forum, and by compulsion against the English owners of The William. That those owners, on their part, had a perfect right subsequently to abandon their action in the courts in Scotland, and to proceed against the ship in the Court of Admiralty in this country, if she came within its jurisdiction, is a point which I conceive can admit of no doubt; and had they discontinued that action prior to the second arrest of the vessel in the month of August, I am clearly of opinion that I must have allowed the action to be prosecuted. There are many authorities to be found as to the effect of a *lis alibi pendens*; but I am aware of none, and none have been cited, which deny to a suitor the liberty of abandoning an action before one jurisdiction, and resorting to another equally competent. In what I have just said I have confined my observations to the case of a suitor abandoning one action, and then afterwards commencing a new one. The case before the court in the present instance, it may be said, is of a different character, inasmuch that at the time of the second arrest of the ship, there was an action actually pending in the Scotch courts, and this action had not been formally abandoned. It cannot be denied that there certainly was in this case an action actually pending. Here, however, arises another peculiarity in the case, which is, I think, well [ \* 229 ] deserving of consideration, namely, \* that the English owners could not anticipate when the ship would come within the jurisdiction of this court, and consequently they could not with prudence abandon their suit in Scotland on the mere chance that they would be enabled to proceed here. They did arrest her on the very first opportunity, and did withdraw their action in the courts of Scotland at the very earliest time it was possible to withdraw it. Under this state of circumstances, I am of opinion that the plea of *lis alibi pendens* cannot be sustained. I now proceed to the second ground of defence, namely, that prior to the second arrest of the vessel she had been sold, and that it would be unjust towards the purchaser to allow the ship which he has bought and paid for to be proceeded against in this suit.

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The Bold Buccleugh. 3 W. Rob.

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With respect to this second objection: it is quite manifest that a mere change of property does not exonerate a ship from the liability of being sued; neither can a sale of a vessel after a collision produce any such effect; if it were so, the owners of a vessel doing a damage would have nothing to do but to sell her, and would thereby deprive the party aggrieved of his best security for compensation. It has, however, been contended, in the present case, that the ship having been released by a court in Scotland, the new purchaser might reasonably suppose she was released from all responsibility; and it is true, I apprehend, that she could not have been again seized in the suit in Scotland by the present plaintiffs. But I do not think this consideration affects the proceedings in this court. As regards the subsequent purchase of the vessel, there is no evidence even to the effect that the present owner knew any thing as to the action or bail at the time he made the \* purchase. What he did [ \* 230 ] know is left, I am sorry to say, very much in the dark. If he knew that there had been a collision, he certainly might have protected himself, either by not making the purchase, or by some other precaution. It appears that this gentleman was advised to commence proceedings in the court in Scotland for the purpose of protecting himself, if he could, from the abandonment of the suit between the English and Scotch owners. The nature of the proceedings is somewhat doubtfully brought before me; but the gist of them, I apprehend to be, to induce the Scotch court not to allow the suit to be abandoned, and to keep before the courts in that country the bail which had been given to answer the action which had been brought therein.

It is unnecessary for me to enter with any minuteness into a consideration of what was done in the course of those proceedings; because I am bound by the result of them, and that result is, that the new purchaser, by the law of Scotland had not any right or interest to detain the bail in that court, and upon that view of the case I must proceed. Now, if it be true then that the mere act of transfer of the property in the vessel will not release the new purchaser from the responsibility of the original collision, and if it be also further true that such new purchaser has no interest in the bail actually given in the original suit in Scotland, what remains for this court to decide? In what way am I to come to a conclusion favorable to the purchaser, and to say that he is released from his liability in the present instance? In the course of the argument, reference was made to the case of *The Druid*,<sup>1</sup> and having read over that case

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<sup>1</sup> [1 W. Rob. 391.]



before I came into court, I will observe, in reference to my [ \*231 ] judgment in it, that the whole of that \*judgment proceeded upon a very peculiar state of circumstances. The question which the court had to decide in that case was whether the owners of a steam-tug were responsible for the misconduct of the master, who had wilfully run into a foreign vessel. That was the point for inquiry, and any observations of mine which did not directly bear upon that question were in the nature of *obita dicta*, which were only applicable to the circumstance of the case itself.

The learned judge here read certain passages from the judgment in *The Druid*, and proceeded to observe — Now looking to the expressions which I used in delivering my judgment in that case, I am not prepared to say that there is any thing which the court repents having given utterance to on that occasion ; nor does it appear to me that any thing I said operates directly on the question now under consideration. In the course of these proceedings, I have felt anxious to ascertain what really was the state of the case with respect to the subsequent purchase and transfer of the vessel, and what measures the present owner had taken to protect himself against possible liability to an action for damages. The papers themselves, I regret to say, afford no satisfactory information at all ; and when I applied to counsel for something in the nature of explanation, if I understood them rightly, I understood them to say, that the original vendors of the ship had been guilty of something little short of misrepresentation in telling the purchaser that there had been an action against the ship for damage, but that it had been settled. If this be so, it is clear there could have been no absolute or unavoidable ignorance

on his part, because the purchase must have been made [ \*232 ] \* with some knowledge of circumstances which rendered the ship liable to be arrested. Upon the whole view of the case, I am of opinion that, upon every principle of justice, I am bound to overrule this protest ; and I do so with the greater satisfaction to my own mind, because I do not see that the present owner will suffer any inconvenience or loss. It is not alleged that the original owners are insolvent, neither is it suggested that, if the damage be pronounced for, and the vessel should be sold, those original owners would not have to make good all the loss he may thereby suffer. Under these circumstances, I overrule the protest, assign the parties to appear absolutely, and I must accompany my sentence in favor of the owner of *The William*, by decreeing to him the costs of these proceedings.

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The Alfred. 3 W. Rob.

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THE ALFRED.<sup>1</sup>

January 19, 1850.

Objection to the report of the registrar and merchants sustained, and the report sent back to be amended.

THIS was a case of objection to the report of the registrar and merchants in a cause of damage by collision. The nature of the objections to the registrar and merchants' report are sufficiently noticed in the judgment.

In objection to the report,

*Addams* and *Robinson* submitted — That in all questions of reference, the authority committed by the court to the registrar and merchants was not a mere arbitrary authority, but was to be exercised upon the same principles which prevailed in all courts of law, namely, a due consideration \* of the evidence [ \* 233 ] brought before them; that the affidavits filed by the owners of *The Argus* clearly established that the items charged in the accounts were confined to the repairs of the damages occasioned by the collision, and that such repairs necessarily caused the detention of the vessel from her ordinary employment for the space of fifty days, for which the owners were legally entitled to be indemnified; that if the charges had been wrongly made, it was competent to the owners of the damaging vessel to have disproved them by the counter evidence of experienced shipwrights, who had surveyed the ship before the repairs were commenced, the owners being resident at Portsmouth, and the vessel having been taken out and repaired in that port; that no such evidence was produced before the registrar, who made the deductions *ex suo arbitrio*, and in utter disregard of the evidence of the owners of *The Argus*. In so doing he had exceeded his authority, and consequently the report must either be reformed by the court, or sent back to them for reformation.

*Jenner* and *Bayford*, *contrà* — That, in point of principle, a reference to the registrar and merchants was analogous to a case heard before the Trinity Masters. In both cases the court defers its own

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<sup>1</sup> [S. C. 7 Notes of Cases, 352.]

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judgment to the practical experience of the persons whom it calls to its assistance; that in this case the registrar and merchants had considered that they had sufficient evidence before them on the part of the owners of The Alfred, in the protest and surveys, and that the further evidence of shipwrights on the spot where the vessel was repaired had not been produced, because it was not needed; [ \*234 ] that it was obvious, from the very nature of some of the items included in the accounts of the owners of The Argus, that certain repairs had been effected, which could not have been rendered necessary by the collision, more especially the garlands, the planks next the keel, which could not have been damaged by the collision; that, with respect to other items, the registrar and merchants considered that more time and labor had been expended than was necessary, and they were consequently justified, not only in disallowing these items, but in reducing the amount of the demurrage. Lastly, that the registrar, in framing his report, had received all possible assistance from the practical experience of merchants fully conversant with the matters they were called on to investigate, and that the report, solemnly and deliberately drawn up under their sanction and advice, was entitled to the highest consideration from the court, and was not to be lightly disturbed.

#### JUDGMENT.

DR. LUSHINGTON. In this case a reference in the usual form was directed to the registrar and merchants to ascertain what was the extent of damage sustained by the owners of The Argus, the parties complainant in the original suit. The registrar and merchants, in the exercise of their authority, have thought fit to make certain considerable reductions in the plaintiff's claim, and the question which I have to decide is, whether such reductions have been rightly made. With regard to the principles upon which I must proceed, I cannot accede to the proposition which was suggested in the argument of the learned counsel in support of the report. However incompetent I may be to discharge the duty devolving upon me, I am [ \*235 ] not at liberty, I apprehend, to divest myself of that duty; but must, to the best of my ability, form my own opinion upon the evidence laid before me, whether the items which have been rejected have or have not been properly disallowed. The analogy which has been urged between the cases of reference to the registrar and merchants, and the cases where the court is assisted by Trinity Masters, is, in my view of the matter, neither correct in point of fact nor apposite to the question before me. In invoking the assistance of the Trinity Masters, the court merely requests them to state their

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opinion, together with the reasons on which that opinion is founded ; and if the opinion of the Trinity Masters is not satisfactory, the court does not adopt it, and never allows persons, comparatively inexperienced in the administration of justice, to raise inferences from a supposed state of facts which does not appear in the cause. It fortunately has happened, that a difference of opinion has rarely existed between myself and the Trinity Masters. Whenever a difference of opinion has been entertained, I have never hesitated to express my own opinion ; and in no case whatever have I pronounced any judgment without being satisfied in my own mind that it was correct. The same principle applies to the case of a reference to the registrar and merchants. In the first instance, undoubtedly, the court is disposed to receive the report of the registrar and merchants with every desire to give it its support ; because the court has, from long experience, well known the pains, labor, and judgment bestowed in their reports, which are very seldom objected to, and which, I believe, have given the greatest satisfaction to the public at large. When, however, an objection is taken to the report, \* and evidence in support of that objection is [ \* 236 ] brought before me, if my own judgment should differ from that of the registrar and merchants, I have no other alternative than to follow the dictates of my own mind.

The principal items which have been reduced by the registrar and merchants upon the present occasion, are the shipwright's and the blacksmith's account, and the claim of demurrage for detention of the vessel whilst she was under repair. It has been pressed upon the court, that, in investigating these items, the registrar has had the benefit of the assistance of merchants peculiarly experienced in those matters, a proposition which does not appear to me to be altogether borne out in point of fact. The gentlemen by whom the registrar is usually assisted in these matters may undoubtedly possess great experience as to the amount of freight a ship would earn ; they may also be fairly competent to judge of a great majority of the items which are contained in the plaintiff's demand. I apprehend, however, that the best judges of what repairs would be necessary in consequence of a collision, and whether they are justly charged, would be shipwrights, or persons accustomed to ship-building.

*The Registrar.* We always have the assistance of persons of that description, and had that assistance in this case.

DR. LUSHINGTON. The observation I made, then, although true in itself, does not apply to this case. Let me now consider what was

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the evidence which the registrar and merchants had before them ; it consisted, as I apprehend, of the protest, four surveys, two affidavits, and the bills and receipts ; and it has been said that their decision was made with reference to the protest and the surveys. If [ \* 237 ] the fact be so, I must confess that the registrar \* and merchants did not decide upon the best evidence in the case.

With respect to protests in general, it is well known that they vary considerably as regards the manner in which they are drawn up. In some of them great care and caution are exercised ; in others, these qualities are altogether deficient. For this reason, I think a protest is not, generally speaking, the best evidence of the damage actually done ; at the same time, it is right to state that the protest in this case is more detailed and more carefully drawn than a great majority of the same class of documents which come before the court. With regard to the surveys, the evidence is still more inconclusive and unsatisfactory. The only information I have received regarding them is, that, comparing them with the various bills and charges made, it would appear that such bills and charges are excessive and exorbitant. Having myself read these surveys, and inspected the bills, I must confess that, without some further explanatory evidence, I am utterly at a loss to comprehend how the proposition is made out that the surveys are incompatible with the bills. But were these surveys even more clear and conclusive than they are, still they would not, I conceive, be the best evidence in the case. The best evidence, in my judgment, would be the testimony of persons who saw the ship and the damage done to her before the repairs were commenced, and who were capable, from their practical experience in shipping matters, of estimating the extent of the repairs which were necessary in consequence of the collision, and what would be the expense in effecting them. Upon both of these points, the registrar and merchants, it appears to me, were left by the owners of The Alfred, upon [ \* 238 ] \* the present occasion, in a situation in which they ought not to have been placed, especially if it was intended to object to the charges contained in the bills. It was incumbent upon the owners of the damaging vessel to have supplied them with the evidence of more than one individual of experience ; and this evidence, it was well observed in the argument, it was within their power to have supplied, residing, as they do, in the immediate vicinity of Portsmouth, where the testimony of many persons who saw the ship might have been procured, and who might have impugned the bills ; if they could be impugned. So much for the evidence produced before the registrar and merchants, on the part of the owners of The Alfred. On the behalf of the owners of The Argus, on

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the other hand, besides the surveys and the protest, two affidavits were brought in; the first of these is the affidavit of Mr. Gibbon, and he swears that "The Argus arrived at Portsmouth on the 15th of February, and was detained there under repair until the 6th of April; that during that time certain work was done to her irrespective of the repair of the damage she had sustained, whereby, however, no detention was occasioned to her, the same having proceeded contemporaneously with the said repairs." He also swears that the schedule annexed to his affidavit contains a full and true statement of the expenses rendered necessary by the collision, and that they were paid by the owners on the 7th of June. Unless this gentleman is grossly misstating, his affidavit furnishes strong evidence as to the repairs which were done. In the course of the argument, a great deal of comment was made upon the admission that other repairs were done to the vessel besides the repairs of the damage consequent upon the collision. I do not \*consider that this objection [ \* 239 ] is entitled to any great weight or consideration, because I apprehend that, almost in every case of collision, the owners of the damaged vessel avail themselves of the opportunity of doing other repairs, which may then be effected at less expense to themselves; and if they simply avail themselves of that opportunity, without injury to the persons who pay for the repairs consequent on the collision, no exception can with propriety be taken against them for so doing. If they attempt to include these repairs in the amount of damages, they would undoubtedly be guilty of fraud; and it is quite right that the registrar and merchants, in investigating the accounts submitted to them, should exercise their vigilance, and see that no greater charge is made against the defendant in the original suit than he is justly obliged to pay. Besides the affidavit of Mr. Gibbon, another affidavit was also submitted to the registrar and merchants on the part of the owner of The Argus, namely, the affidavit of Mr. Gatton, the managing owner of the vessel, which contains a history of the ship up to the period of the collision. So stood the case before the registrar and merchants; and, looking to this state of facts, I must say, *prima facie*, that the evidence on the part of The Argus was sufficient, whilst on the part of The Alfred there was no sufficient evidence brought forward, and there was no attempt to clear up doubt or difficulties, excepting by inference from the surveys, which do not in my view of them necessarily include every thing which ought to have been done to the ship. Since the report of the registrar and merchants was made, additional affidavits have been filed on behalf of the owners of The Argus, and two affidavits have been made on the part of the owners of The Alfred. \* The [ \* 240 ] question now comes before me upon the act on petition,



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whether the registrar's report shall be confirmed by the court, or sent back for the purpose of amendment. The first affidavit on the part of the owners of The Alfred, is the affidavit of Mr. Smith, a ship-builder in this town, and he states that he has carefully and most attentively perused and considered the protest, surveys, and bills, and he comes to the conclusion, and positively maketh oath, "that very extensive repairs have been done to The Argus beyond the amount of damage stated in the protest, and beyond what the surveys state to be necessary to make good that damage; he also states that he could and would have effected the necessary repairs in five days, and whilst The Argus was afloat. If this statement be correct, the registrar and merchants, it appears to me, have acted most liberally towards the owners of The Argus, for the repairs could not have cost one fourth of the money which they have allowed. I must confess, however, that the mode in which this gentleman swears is somewhat startling and suspicious, inasmuch that he points out in his affidavit none of the repairs to which he alludes, and he never saw the ship, and consequently could have had no means of forming an accurate judgment upon the matters to which he deposes. The other affidavit brought by the owners of The Alfred, the affidavit of Mr. Long, states that the respective sums of 216*l.* 6*s.* 9*d.* and 21*l.* 17*s.* 6*d.*, which have been allowed by the registrar and merchants for the shipwright's and the blacksmith's bills, are most ample and liberal, and much more than could have been required for repairing the damage sustained by the said collision. The two gentlemen, therefore, [ \* 241 ] arrive at the same conclusion, and nearly upon the \* same premises; and if their evidence is to decide the question, the registrar and merchants have made a mistake the other way, and I must send back their report for the purpose of the reduction being still further increased in amount. For the reason, however, which I have already stated, I must say neither of these affidavits, made by gentlemen who never saw the vessel, and who knew nothing about it, even if uncontradicted, would in my mind be at all satisfactory, or entitled to much consideration. But they do not stand uncontradicted in the present instance. Additional affidavits have been brought in on the other side, which *prima facie* are entitled to reasonable credit at the hands of the court. The first of these is made by Mr. Garratt, Mr. T. White, and Mr. Oakshot, and they state that they were employed in repairing The Argus, and that the shipwright's accounts, and the whole of the blacksmith's accounts, were truly and justly incurred in replacing and repairing the damages sustained by The Argus in and by the collision. They also further state that, although other work was done to her, the charges for the same were kept separate, and that one item which was first charged in the pri-

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vate bill had, by mistake, been copied into the other, a mistake which, in my judgment, cannot at all invalidate the effect of the evidence, or disparage the general *bona fides* of the transaction. The next affidavit is made by Mr. Garratt, Mr. Claughlin, and Mr. Oakshot. Mr. Oakshot swears that, in conjunction with Mr. White, he made the surveys of the vessel; that at the time of making the first survey, the brig was afloat and laden, and it was then wholly impossible to ascertain fully the extent of the damage she had sustained; that, with a view to save expense, they only recommended a part of the \* cargo to be unladen, for the purpose of further examining [ \* 242 ] her keel; that, in the progress of the unloading, further damage was discovered to have arisen from the collision, and they ascertained that she had thereby been so much strained and injured throughout that the course recommended by the third and fourth surveys was absolutely necessary to enable her to prosecute with safety the voyage for which she was chartered. Mr. Claughlin says, although he did not actually attend the surveys and examination of the vessel whilst afloat, yet he superintended the hauling her upon the patent slip; that he examined her whilst there, and also attended the fourth and final survey, preparatory to her being repaired, and did fully and accurately examine all the losses and damage occasioned to the brig by the collision; and all the deponents make oath that, throughout the whole of the repairs, the utmost care was enjoined to the agents and the captain, and was exercised by them, to avoid every possible delay and expense not strictly needful; that the time occupied in the repairs unavoidably extended to the 6th of April, and that the idea of repairing the vessel whilst she was afloat was utterly preposterous and absurd, the whole of her hull and bottom requiring caulking thoroughly. With these affidavits before me, I am bound, I conceive, to direct certain reformatioes to be made in the registrar's report, more especially in regard to the shipwright's and the blacksmith's accounts. In the former of these, I direct the original sum of 300*l.* 7*s.* to be restored, and the amount of the blacksmith's bill to be increased from 21*l.* 17*s.* 7*d.* to the sum of 34*l.* 11*s.* 2*d.* With regard to another item, namely, the wages of the master and crew for a period of fifty days, during which the vessel is alleged to \* have been under repair, it appears to me that there is no- [ \* 243 ] thing in the evidence to justify its reduction, and I must therefore direct it to be restored to the original sum. With respect to the loss for the non-employment of the vessel, during her detention at Portsmouth, which is charged at two guineas a day, I conceive that the registrar and merchants are more peculiarly competent to form a proper estimate of the propriety of that charge, and I shall

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not take it upon myself to disturb the reduction which they have made. With respect to the other items, I shall refer the report back generally to the registrar and merchants, to be reconsidered by them, and, if necessary, to be amended; and with respect to the costs, I shall give to the owners of The Argus the costs of their objection.

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THE ORIENTAL,<sup>1</sup> Hoyt.

March 25, 1850.

A bottomry bond, granted in New York, by the master of a vessel whose owners were residing at St. John's, New Brunswick, (a communication by electric telegraph existing between the two cities,) held to be valid, although the bondholder had previously acted as agent in the concerns of the ship, and no intimation had been made to the owners of the bottomry transaction until after the bond was executed.<sup>2</sup>

THIS was a cause of bottomry, brought by the holders of a bond, granted by the master, in the port of New York, upon the ship, freight, and cargo.

The act on petition in substance alleged, that the vessel, whilst proceeding down the bay of New York, in the prosecution of a voyage from the port of New York to England, struck violently on that part of the bar of the outer harbor called Flinn's Knowl, and in consequence of the damage sustained thereby she was compelled to put back for the purpose of repairing the same; that the master, being totally unprovided with the necessary funds, and being unable to raise the same upon his own personal credit, or the credit of [ \* 244 ] his owners, applied to George Miln, a merchant \* of New York, to advance the same, and in consideration of such advance he gave him a bond upon the ship, freight, and cargo, for the payment of the principal sum of \$5,491, with interest at the rate of 15l. per cent., such aggregate sum for principal and interest amounting in value to \$6,479.90, equivalent to 1,393l. 10s. 7d.; that the ship safely arrived at the port of Liverpool on the 20th April following; and, although frequent applications have been made for the payment of the bond, the same has not been discharged.

On the part of the owner it was in substance alleged in the an-

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<sup>1</sup> [S. C. 2 Law & Eq. 546, and 7 Notes of Cases, 476.]

<sup>2</sup> [Reversed on appeal. See note at the end of the case.]

swer to the act on petition, that the vessel was the property of Mr. Wallace, of St. John's, New Brunswick, and for three years last past had been employed in trading between the ports of New York and Liverpool, under the command of Hoyt, the present master. That during such time Messrs. Cannon, Miller & Co. were the regular appointed agents of the owner at Liverpool, and G. Miln was his regular appointed agent at New York. That the said agents respectively transacted all the business connected with The Oriental and other vessels belonging to the said Mr. Wallace, at the said ports, which were always consigned to them as agents, and that by the general instructions given him by his owner, the master was authorized to draw bills on the said Messrs. Cannon, Miller & Co. for the money required for the necessary disbursements of the said ship at New York. That such the master's instructions were well known to the said George Miln, and on the arrival of the ship on her last preceding voyage to New York, the said George Miln, as agent of the said Mr. Wallace, sold the cargo of coals laden on board, and having applied the proceeds in part \* payment of the [ \* 245 ] disbursements for the vessel, caused the master to draw a bill in his favor, for the balance of the same, upon Messrs. Miller, Cannon & Co. That subsequent to the sailing of the vessel from the port of New York for Liverpool, on the 21st of February, she got aground and put back as stated, and the said George Miln undertook to communicate to the owner the return of his vessel. That in the usual course of post a letter can be sent to St. John's from New York, and an answer thereto be received, in twelve or fourteen days. That there is also a communication by electric telegraph between the two cities, and by such communication a message from New York can be transmitted to St. John's in less than three hours. That upon the return of the ship to New York, the master proceeded at once with the unloading her and with her repairs, himself superintending the same, in the full expectation that as matter of course the said George Miln, as agent for the owner, would as usual advance the funds required for such purposes, upon a bill drawn by the said master as heretofore on the said Messrs. Cannon and Miller, for the amount of such advance, or on the said T. Wallace, the owner of the ship, if he should so prefer. That no allusion whatever was made to a bottomry bond either by the master or the said George Miln until on or about the 7th of March, when the repairs of the ship having been completed and the cargo reladen on board, the ship was nearly ready for sea. That at such time the said George Miln proposed that the master should execute a bond of bottomry for the expenses which had been incurred, and upon the master strongly objecting to

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do so, the said George Miln informed him it was a common thing, and that he had written or would write to the owner there-  
[ \* 246 ] upon. \* That the said George Miln, in order to obtain the consent of the said master to such bottomry bond, further informed him that his owner would have very little to pay, as the cargo was valuable, and as a further inducement, promised to allow the owner of the said ship the difference of expense, so far as the ship and freight were concerned. That by reason of the statement of the said George Miln, that he had written or would write to the owner, the said master made no communication to him on the subject, although there was ample opportunity for his so doing before executing the said bond. That on the 10th of March the said George Miln, for the first time, took means to communicate to the owner his intention to take from the master a bottomry bond, but, instead of making such communication by telegraph, which would have afforded the said owner sufficient time to reply thereto, the said George Miln, on the day aforesaid, wrote a letter addressed to the said owner by the general post, which in due course of post was received by him on the 15th of the same month, being three days after the execution of the said bond. That in such letter the said George Miln stated that he had deemed it prudent to take a bottomry on the cargo for the expenses, which he hoped the said owner would approve of, as he was ready to relinquish the proportion of premium that might fall to his share of the loss, and that had the said money been advanced for the account of the said T. Wallace, he should not have taken a bottomry bond at all. That the sum secured by the said bond is 6,479 dollars and 90 cents, equal to 1,393*l.* 10*s.* 7*d.* sterling money, of which the sum actually paid by the said George Miln was 3,920 dollars only, the remainder being the charge of the said George  
[ \* 247 ] Miln of 5*l.* per \* cent. commission on the said sum and for the commission of 2½ per cent. on the estimated value of the cargo at bottomry premium at 18*l.* per cent. on the total amount of such advances and commission.

The reply on the part of the bondholder in substance alleged, that, although the vessel, Oriental, on her former voyages to New York, had occasionally been consigned to Mr. Miln as stated, it was not so consigned direct from the owner, but from the master, who had always been at liberty to change such consignment. That the said George Miln had no knowledge that the master was empowered to draw upon Miller & Co. of Liverpool, except so far as arose from his ordinary power as master to bind his owner in a case of necessity. That any agency which the said George Miln had undertaken in the concerns of The Oriental had ceased entirely when The Oriental left

New York, prior to her getting on shore. That all control over her, belonging to him as consignee or agent, had also ceased, and it was entirely out of friendship towards the master and the owner of the vessel, that he took any part in relieving her from her difficulties upon her return. That the said George Miln received no instructions from the owner in answer to his communication respecting the disaster which had befallen The Oriental, neither did the master inform him that he had received any. That the whole business of unloading, repairing, and reloading the vessel was done by the master himself, and that all debts in respect thereto were contracted by him on his own responsibility. That the making up the statements and accounts and calculating the losses was effected by Messrs. Lawson and Graham of New York, into whose hands the business had been placed by the master, and that the said George Miln \* had [ \* 248 ] no control whatever in the matter, nor did the said T. Wallace, the owner, on any occasion during the whole transaction, apply to or receive the advice, assistance, or agency of the said George Miln. That the said George Miln incurred no liability for the said disbursements, nor at any time whilst the repairs were going on did the said master inform him or suggest to him that he would be expected or required to make any advances, nor did the master ever exhibit to him any instructions from his owner, or explain in any way the arrangements he had made for defraying the expenses of the repairs and outfittings then going on. That until the total amount of expenses and disbursements became known to the said master, he never applied to the said George Miln upon the subject, but that directly he found the great difficulty he was in, and that he could not raise the money otherwise, he applied to the said George Miln to advance money, in order to pay and discharge the debts contracted. That the said George Miln, being already in advance to the owner on account of the said bark, declined to make any further advance or advances on the credit of the owners, and so informed the master, as well as Messrs. Lawson and Graham, the average brokers. That after such refusal on the part of the said George Miln, the master caused advertisements to be inserted in the public journals for a loan of bottomry on the said bark and the cargo laden therein in the usual way. That to these advertisements three written answers were received, one from J. Winslow, at a premium of 20%, and one from Innes & Co. at 22%, and from George Miln at 18%. That had George Miln not offered, the master would have accepted the next lowest offer. That the said T. Wallace, the owner, although informed of the state \* and condition of his vessel, never throughout the [ \* 249 ] whole transaction communicated any instructions to the



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said George Miln, or in any way proposed himself to advance the necessary money, though he might easily have done so, had he been able to make such advance. That the said master acted throughout the whole transaction as agent for his owner, and that all communications were made to the master direct, and none whatever to the said George Miln. That the electric telegraph was equally available to the said master as to the said George Miln, and he might and ought to have communicated with his owner, and that the necessity of a bottomry bond must have been throughout contemplated by them both as the only means of freeing the said vessel. That after the said bottomry bond had been advised to the said T. Wallace, he never took any objection thereto, or ever expressed himself to the said George Miln as displeased thereat. That the commissions charged on the said bond are below the usual commissions, and below such as other merchants would charge in a similar position. That, although St. John's, New Brunswick, and New York, are both cities between which there is a telegraph, yet that by the laws of the United States a bottomry bond, with the privity and consent of the owner, may be taken up in the country in which the owner of a vessel resides, and in such case is considered to be and is valid and legal.

On behalf of the bondholder,

*Queen's Advocate* and *Bayford* submitted,

That, with respect to the alleged agency of Mr. Miln, the bondholder, the evidence only proved that upon certain occasions, previous to the transaction \*in question, he had acted in that character in the management of *The Oriental*, and had done so in the present instance prior to her putting back to New York to repair the damage she had sustained. That upon the departure of the ship from New York, the last agency had completely terminated, and all connection of Mr. Miln with the vessel's concerns in the character of agent had ceased. That even assuming, for the purpose of the argument, that such agency had been renewed upon the vessel's return to New York, by the principles of law adopted in the Courts of Admiralty, it was fairly competent to Mr. Miln, although acting as agent, to withhold his assistance in the shape of advances of money on the ship's account, and to demand upon such advances the security of a bond of bottomry (*The Hero*;<sup>1</sup> *The Augusta*;<sup>2</sup> *The Tartar*).<sup>3</sup> That in respect of the *factum* of the bond in

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<sup>1</sup> [2 Dod. 189.]

<sup>2</sup> [1 Dod. 283.]

<sup>3</sup> [1 Hagg, Ad. R. 1.]

question, the whole *res gestæ* sufficiently established that the giving the bond was not in any degree forced upon the master by any undue influence or solicitation on the part of the bondholder. He, the master, had the option of selecting between the different tenders which had been made in answer to his advertisements, and had fairly chosen (as he was in duty to his owner bound to have done) the tender of Mr. Miln, as being at the lowest rate of premium. That if the owner had possessed the means of providing the necessary funds himself, or of raising them upon his own personal security at New York, he had sufficient intimation of the state and situation of his vessel, and might have given the necessary instructions to the master accordingly. On the contrary, he had not only omitted to give any such directions, but to a certain extent had virtually acquiesced in the transaction by the total absence of \* any imputation [ \* 251 ] or blame on his part towards the bondholder in reply to the letter announcing to him the execution, &c., of the bond in question.

*Robinson and Twiss, contra.*

That the validity of all bottomry transactions depends upon the fundamental principle, that the vessel, at the time the advances are made, should be in a state of unprovided necessity. That this necessity was not established in this case, because the master might have drawn, as he had done before, upon Messrs. Miller & Co. of Liverpool, and there was no proof that the bills so drawn would not have been duly honored, or that they might not have been negotiated in New York, where the owner of the vessel was known as a person of good mercantile character and substance amongst the merchants of that port. That although it was true that an agent, *quà* agent, is not bound to make advances of money out of his own pocket for the service of the ship consigned to his charge, and although it was open for him to demand and take a bottomry bond as security for such advances, if made, yet in so doing he stands in a very different position from an ordinary merchant. Before he can repudiate his agency, and divest himself of his character as agent, and take upon himself the character of a third party, he is bound, when such communication is practicable, to give due notice of his intention, not only to the master, but also to the owners of the ship. This was the doctrine laid down by Lord Stowell, in the case of *The Hero*, cited on the other side, and in that judgment Lord Stowell qualifies the principle, that an agent may be a bondholder upon the vessel in whose service he is employed, in these terms, "Cases may \* possibly arise in [ \* 252 ] which an agent may be justified in so doing, if in such a case he gives fair notice that he will not make any further advances as

agent, and affords the master an opportunity of trying to get money elsewhere; if he is unable to do so, and is obliged to come back to him for a supply, then he is fairly at liberty, like any other merchant, to advance the money on a security more satisfactory to himself." That the *fanctum* of the bond in this case did not come within the principle thus laid down, because the owner himself was residing at St. Johns, New Brunswick, and might have been communicated with upon the subject immediately upon the ship's return to New York, and before any expenses had been incurred, or the unloading and repairs of the ship had been commenced. Instead, however, of the more speedy communication by means of the telegraph having been resorted to, the repairs were begun at once upon the ship's return to New York, and through the slower communication of the post, intimation of the disaster was communicated to the owner, and the expenses were actually incurred, and the bond given, before the owner's reply by the same medium could be received at New York. That under the circumstances, and more particularly upon the latter ground, namely, a want of sufficiently early communication with the owner in this case, the validity of the bond was not sufficiently established.

#### JUDGMENT.

DR. LUSHINGTON. The learned judge having fully adverted to the general history of the bottomry transaction as disclosed in the bond itself and in the pleadings in the cause, proceeded to observe to the following effect: The substance, then, of the defence, which is [ \* 253 ] set up \* by the owners of The Oriental, against the validity of the bond is, that the party who advanced the money on bottomry was acting at the time in the capacity of agent to the vessel. 2dly. That the master was authorized to draw bills upon Messrs. Cannon & Co., for the disbursements of the ship at New York, and that the requisite funds might have been procured from them without having recourse to a bond of bottomry. 3dly. (And upon this point great stress was laid in the argument of the learned counsel in opposition to the bond) that there was a want of that due communication with the owner, under the circumstances of the case, which was fatal to the claim of the bondholder in the present instance. Such being the line of the defence, it is necessary, in the first instance, to consider what is the true construction of the law with regard to an agent of a vessel making advances for the service of the ship, and taking a bond of bottomry for those advances. That an agent cannot, under any circumstances, take a bond of bottomry upon the vessel in whose service he is employed, is a proposition which cannot, I conceive, be universally maintained. There can be no obligation upon

a merchant, merely because he takes upon himself the character of agent, to advance to any required extent his own funds for the repairs and outfit of a vessel consigned to his charge. It forms no part of the contract into which he enters when he becomes an agent, that he should make such advances, and it must rest with himself to judge of the prudence of so doing, according to the circumstances in which the vessel is placed. To this extent I am borne out by the judgment of Lord Stowell in the case of *The Hero*, which was cited by the Queen's Advocate in the course of his argument. Independently of \*that high authority upon all principles of just reasoning, [ \* 254 ] there can, I think, be no such general obligation upon an agent to advance his money ; at the same time, it does not follow, as a necessary corollary, that he has a right to take a bottomry bond upon the ship ; neither does it follow that in all such cases he would have the same right to take such a bond as a person wholly unconnected with the vessel. The legal line of demarcation, it appears to me, lies between the two extremes. To use Lord Stowell's own words, cases may possibly arise in which an agent may be justified. The real question therefore is, whether the facts attending the taking of this bond constitute such a case ; it is clear it must be a case in which the agent does not take advantage of his character as agent to take a bond which by the proper discharge of his own duty might have been avoided. Looking to the evidence which is before me, it is evident that Mr. Miln had acted as agent for Mr. Wallace, the owner of the vessel, on several occasions during the last five years, although I do not find that there was any regular appointment of him to that capacity. Whether there was or was not is a matter of no importance in the consideration of the case, because, even assuming that Mr. Miln had been regularly appointed as the ship's agent, such a circumstance, standing alone, would still make it no part of his duty to advance funds on the personal credit of Mr. Wallace, neither would it wholly incapacitate him from taking a bond of bottomry. Mr. Miln himself states that he did not consider himself to have any appointment as agent to Mr. Wallace ; on the contrary, that he believed the master had authority to consign the vessel to him or to take it out of his hands, and that his employment, whatever \* might have been its nature, [ \* 255 ] ceased when the ship first sailed, and before she got aground. How far Mr. Miln was right in this opinion, it is necessary here to consider ; it is sufficient for the purpose of my decision in this case, that, coupling the fact of his having previously intermeddled in the concerns of the ship with the part he took upon her return to New York, he was ostensibly acting as agent, so far at least as justly to induce Mr. Wallace so to consider him. This is clearly to be inferred

from the correspondence, particularly the letter written by Mr. Miln, and which is dated New York, 26th February, 1849.

The contents of that letter are to the following effect:—

“ Dear Sir, — I sent you a few lines on the 23d instant, per telegraph, advising you of the unfortunate occurrence which happened to The Oriental on her getting to sea, and just at the moment when the pilot was preparing to leave her. She is now in the Atlantic Dock, and the surveyors having ordered her to be discharged, we commenced unloading on Saturday morning, and will have all the cargo out to night, and will have her on the ways on the following day, when another survey will be held on the vessel, and I will then report to you what injury she has sustained. Although she lay all night on the sand, yet the weather being moderate, induces me to think that she is not seriously injured, as the leak has decreased since we began to lighten her. The expenses will be considerable; but fortunately the cargo will be valuable, and being a general average it will not fall so severely as otherwise might have been the case. It however vexes

and annoys me much that such a misfortune should have [ \* 256 ] occurred immediately on the \* back of The Kate Kearney, and Captain Hoyt also feels it as much as myself. I shall use all exertion to have her ready for sea again, and if the repairs do not detain us, she may be loaded again by the end of this week. Our insurance companies are getting quite sick of British ships, and it is now very difficult to get them insured on any terms, the losses this season have been so heavy; but in the case of The Oriental, no blame is attached to any one but the pilot, and it was certainly a great piece of carelessness on his part.”

Such is the letter from Mr. Miln to the owner announcing the return of the vessel to New York; and it is impossible to read the contents of it without being satisfied that it is a letter written by a person in the character of agent, and I am bound to hold that he was clothed, *quâ* this ship, with all the responsibilities, obligations, and disabilities attendant upon that character.

Assuming this to be so, the question now arises, whether Mr. Wallace was possessed of funds or credit to satisfy the demands of this exigency, and that Mr. Miln was aware of it. Throughout all the proceedings I do not find it directly averred, and certainly not as I believe proved by evidence, that Mr. Wallace had ever given express directions or authority to Mr. Miln to draw at all, either upon Messrs. Cannon & Co., or upon Mr. Wallace himself, for the expenses of so large an outlay as took place upon the present occasion. I may go further, and state that I find no general authority for Mr. Miln to draw at all either upon this or any other occasion. But even supposing

there had been a general authority to draw, still it must have been open to Mr. Miln to exercise his own discretion, whether he would advance his own \* funds upon the personal credit of [ \* 257 ] Mr. Wallace. If he were indisposed to do so, the utmost extent of any legal obligation upon Mr. Miln would be, that if practicable, he ought to have given notice to Mr. Wallace that he would not advance money upon such a security. I say "if practicable," for it would be absurd to suppose that in all cases such notice was imperatively required to be given. Take, for instance, the case of a valuable ship and cargo consigned to the care of an agent in China; if an accident happens to that ship, and she requires to be repaired upon her arrival in her port of destination, how is the agent to give notice, upon the spur of the moment, to the owners in Europe? What is he to do under such circumstances? If the proposition could be established, that without previously apprising the owners of the exigencies of the vessel, and of his own disinclination to make the necessary advances upon the personal credit of the master and owners, he could not safely make the same upon the security of a bond of bottomry, such a state of the law would, in my judgment, be most detrimental to the owners of vessels in general. The effect of it would necessarily be to throw into the hands of strangers transactions which would be better and more cheaply done by those whom the owners had trusted, and who had an interest in keeping up the connection. It would, moreover, be detrimental in another respect, inasmuch that it would necessarily narrow the market, by excluding a class of persons most willing to undertake the business, and to a certain extent naturally disposed to consult the interest of the owners for their own sakes. It must not be supposed, from the observations which I have just made, that I would at all uphold an agent who, having \* authority to draw bills, and who having given to his prin- [ \* 258 ] cipal reason to believe that he would advance money on personal security, should take from the master a bottomry bond without notice to his employer, where such notice could be given, so as to enable the principal to avoid the bottomry if he were so disposed. In the present instance I am satisfied that the agent had no such authority given to him individually; and although it has been said that the master had the authority to draw bills, and that he would have done so, I have no sufficient evidence to satisfy my mind that Mr. Miln knew of any such authority. The question, therefore, it appears to me, resolves itself into this, did Mr. Miln, acting in the character of agent, as I think he was, give to Mr. Wallace the notice which could be reasonably required? If the law required that he should give specific notice that he would not advance his money on personal credit, but would require a bond



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of bottomry, assuredly no such notice was given. As I have already observed, such notice is not in all cases imperatively required. What then was the notice given, and what the conduct of the parties under the circumstances of the case? The ship returned to New York on the 22d of February, and on that day Mr. Miln acquainted the owner of the fact by telegraph. Mr. Miln says that in so doing he considers that he was only acting as a friend of the owner. In my view of the matter, he was acting as agent, and in that character was acting most properly in making this early communication to his principal. What is the conduct of Mr. Wallace upon receiving the information that his ship had been aground, and had returned to New York? In

what way does he act to protect his property? What [ \* 259 ] answer does he send to \* Mr. Miln, or what instructions does he give? Does he write to him as his agent, and say you will superintend the repairs, take care the outlay is not excessive, and make the necessary advances on account thereof, and, according to my previous authority, draw bills upon me for the amount, or let the master do so? Whatever might have been the previous state of things, some such communication might have been expected, and most reasonably, by Mr. Miln in return to his letter. How does the fact stand upon the evidence before the court? Mr. Wallace upon the 22d of February writes two letters in reply, one addressed to Mr. Miln and the other to Captain Hoyt, the master, in neither of which are there to be found any directions whatever as to the manner in which the disbursements are to be paid for. The letter to the master is in the following words:—

“ Dear Sir, — Your favor of the 15th instant came to hand last evening, and I received advice this morning, by telegraph, from Mr. Miln, of The Oriental having been on shore, and having put back leaky, and discharging cargo. I trust the injury is very slight, as the vessel is very strong in the bottom and all parts; it is more than likely that she is merely strained, and that she will only require caulking. However, she must be repaired, and proceed on her voyage with all possible despatch. If the cargo should be much damaged and sold, it might do to put a coat of stuff on her bottom to prevent the worms from doing injury, and charter her to load at Apulichicola if 9l. 16s. per cent. could be obtained. I only make these suggestions, but do not think it is likely to take place. There

should be good freights at Savannah and New Orleans [ \* 260 ] yet this season. \* I notice that you wish me to pay Mr. Raymond 150l. on your account. It will be rather inconvenient for me to pay it for two or three months; but if he requires it, I shall have to arrange it with him in some way.”

Such are the terms of this letter, written by Mr. Wallace upon the

23d of February, after he had received intelligence of the accident which had happened to his ship.

Although he comments upon the accident itself, and suggests what may possibly be done for the future employment of the ship, he says not one single word as to providing for the repairs; nor does he refer to any arrangement previously made, or to any mode whatever for supplying the necessary funds. I really must say that it was the duty of Mr. Wallace, for the protection of his own interest, to have written in rather a more business-like manner. After receiving the intimation conveyed in this letter, that it would be inconvenient to his employer to pay 150*l.* on his account, it would, I think, have been somewhat surprising if Captain Hoyt, in the absence of any express direction so to do, had drawn upon Mr. Wallace for 1,350*l.*, or even for half of that amount. I must now refer to Captain Hoyt's affidavit; in it he speaks of the 200*l.* draft he had drawn for the cargo of coals, and which had been taken by Mr. Miln in part payment of the disbursements of a former voyage; and this circumstance has been much commented upon, as tending to fix upon Mr. Miln the obligation to accept the master's drafts on the present occasion. I cannot say that in my view of the question this circumstance leads to any such inference, because, independently of Mr. Miln's explanation that the transaction was unexpected on his \*part, [ \*261 ] it by no means follows, that because an agent will run the risk of advancing upon personal security 200*l.*, he will therefore encounter the same risk to the extent of 1,350*l.*

The master swears to this effect, that he had no particular instructions, but a general direction to draw upon Cannon & Co. if he wanted money; if this be so, it is somewhat strange that he being so reluctant to give a bond should never have exercised that power; for throughout the whole transaction there is not, as far as I can discover, any evidence of his having made any one attempt to use this credit in any way whatever. Again, even assuming that he had used it, there is not a tittle of evidence to show that anybody in New York would have taken drafts upon Cannon & Co., or upon Mr. Wallace himself. It is idle to talk of a power to draw, unless you can prove that some person was willing to advance the money. It is clear, from the examination of all the evidence, that Mr. Miln, although he gave Mr. Wallace early and ample notice of the disaster which had befallen his vessel, and that extra expenses would be incurred in her repairs, did not inform him that he would advance the necessary money, nor that he would require a bond of bottomry. He did neither, expecting, I apprehend, to receive advices upon the subject from Mr. Wallace; and I certainly am at a loss to conceive why

it was that Mr. Wallace, from the 23d of February up to a late period in the transaction, never wrote at all upon the subject of the advance of funds.

There is no evidence to show that Mr. Miln at any time held out to the master, or any other person, that he would in any way be responsible for the expenses, or that he would make any ad-  
[ \*262 ] vances. He \* expressly swears that he never did make himself responsible, and in this he is wholly uncontradicted.

As far as I can trace the transaction from the evidence which is before me, the course of it appears to have been this: the unloading and repairing of the ship, and the reloading the cargo, as a matter necessary to be done without delay, were proceeded with immediately upon the ship's return to New York, by the orders of the master, and under the superintendence of Mr. Miln. Nothing was said by any one as to the payment or advance of money. Mr. Wallace probably expected that Mr. Miln would supply the funds. Mr. Miln as probably thought that Mr. Wallace would give instructions respecting them. In this state of uncertainty matters went on until the ship was repaired and ready for sea, and the exigency as to providing the funds then arose. From Mr. Miln's letter, dated the 7th of March, which is annexed to Mr. Miller's affidavit, Mr. Miln seems at that time to have his doubts whether he should require a bond of bottomry or advance on Hoyt's drafts, because in the postscript he says, "As the expenses here of landing and reshipping the cargo will be considerable, and having no funds of the owners in hand, I think it will be prudent for all parties to take a bottomry on ship and cargo for my advances. I will therefore thank you to insure 3,000 dollars on said bottomry, to protect all interested. The ship is now in fine order, and her cargo, as also the vessel, has been insured here on as low terms as any British ship out of port. Captain Hoyt is also a favorite with our underwriters, and I could have done it here; but in case I should take Captain Hoyt's drafts on you for the amount, I thought it well to have the insurance drawn on your side

[ \*263 ] for \* your own security. If I understand the meaning of those expressions rightly, it is, that Mr. Miln was in doubt whether, under all the circumstances, he should or should not advance on personal security; in other words, whether he should take Captain Hoyt's drafts on Cannon & Co., or on the owner, Mr. Wallace. In the event, however, of his so doing, he wishes an insurance made to protect them as well as himself. Although Mr. Miln might have had such an idea in his mind, there is not, as I have already observed, any evidence that he expressed such an intention to the master or any one else. Upon this point the affidavit of Mr. Lawson is most

important, in enabling the court to trace the real course of the transaction. He states "that his house of business, as average brokers, was, on the return of the ship to New York, applied to by Captain Hoyt for advice and assistance, which was given; that he informed them that he was not able to raise the necessary funds; and he consulted Mr. Lawson as to the best means of so doing, informing him that his owner was not able and had not provided them; that Mr. Miln, who had been the agent of the ship on other occasions, had positively declined to make the advances; that he advised the master to advertise for the amount on bottomry, and he then states, that with the master's authority his house advertised accordingly on the 9th and 10th of March; that three answers were received, offering to make the advances, one at a premium of 20 per cent., another at 22 per cent., and one from Mr. Miln at 18 per cent.; that he, the deponent, advised the master to take the money from Mr. Miln, as he had made the most favorable offer; that Mr. Miln, in the presence of the deponent, and in the presence of Captain Hoyt, \* refused to make [ \*264 ] the advances necessary to pay the disbursements of the ship on the simple security of the owner, who, he believes, from frequent conversations he, the deponent, had with the master on the subject, had left the whole management of the matter in the master's hands, to do the best in his power to raise the necessary funds, the owner not being disposed or able to make the advances himself." If this evidence is to be believed, as I think it is, it conclusively establishes the important fact, that it was not in the master's power to procure the necessary funds otherwise than by the execution of a bottomry bond. Then the only question which remains to be determined by the court is, whether it was competent for Mr. Miln, under the circumstances, to take such a bond. In my opinion he was fully competent so to do. It may be true, that, if all the expenses had belonged to Mr. Wallace, he would have been willing to advance the money on personal security. He manifestly wished well to Mr. Wallace, for he was willing to forego the bottomry premium so far as it would fall on the ship, but he was in no degree inclined to incur risk on account of the underwriters of the cargo. If there had been no previous communication at all from Mr. Miln to Mr. Wallace, and if Mr. Miln had gone on to act as agent, still more, if there had been the slightest intentional concealment on the part of Mr. Miln, the case would have stood in a very different position, and would have assumed an unfavorable complexion. When, however, I look to the correspondence, I see no proof of an attempt at concealment on the part of Mr. Miln, and I cannot hold, as it has been contended in the argument, that he was bound to have availed himself of the channel

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[ \*265 ] of communication afforded by the electric telegraph \* before he took the bond, and that the omission so to do vitiates the bottomry transaction. I must therefore pronounce that this is a valid bond, and refer the correctness of the items charged in it in the ordinary form to the investigation of the registrar and merchants.

*Note.* This decision was appealed to the judicial committee of the Privy Council, and their lordships reversed the judgment, and pronounced against the validity of the bond, principally upon the ground that the bondholder had previously not communicated his intention of taking the bond to Mr. Wallace.

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THE HELENA SOPHIA,<sup>1</sup> Forshall.

March 25, 1850.

A claim for advances made to the master of a foreign ship, under the stat. 3 & 4 Vict. c. 65, pronounced against, with costs, upon the ground of fraudulent collusion between the master and the party making the pretended advances. *Semble*, an action not maintainable under the statute in the Court of Admiralty, where there is an agent of the owners upon the spot, ready to supply the necessary funds.

THIS was an action brought by Louis von Carnevalli, of Great Grimsby, shipbroker and shipping agent, for necessities alleged to have been supplied to the Russian vessel, Helena Sophia. The act on petition set forth that the vessel having, in her voyage from Odessa to Leith, met with tempestuous weather off the English coast, was, on the 22d of March, 1849, assisted into the port of Grimsby, where the master, being apprehensive that the vessel would be arrested for salvage services, and being without funds, applied to Mr. Carnevalli to advance the necessary sums, and that Carnevalli accordingly paid 30*l.* to some fishermen who had assisted the vessel into Grimsby, 25*l.* for the use of a steamer which had towed her thither, 55*l.* for the use of lighters and for labor in discharging the cargo, and also advanced to the master, at divers times, sums [ \*266 ] amounting \* to 212*l.*, for wages and the maintenance of his crew, and for light and buoyage dues, the whole amount being 322*l.*, which was advanced on the credit of the ship alone.

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<sup>1</sup> [S. C. 7 Notes of Cases, 492.]

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The answer of the owners alleged that, on the 23d March, the vessel arrived at Grimsby, and on the same day the master, Forshall, (who was superseded in the command of the vessel, by the owners, on the 13th April following,) appointed Messrs. Hans Marcher & Co., of Hull, agents for the ship; that they took upon themselves the character and duty of agents, especially in making the requisite payments and advances on account of the ship; in particular, having paid 30*l.* to certain fishermen for assisting her into Grimsby; that 5*l.*, not 25*l.*, for the use of the steamer, and 8*l.*, not 55*l.*, for lighters and labor, had been in fact paid by Mr. Carnevalli, and such sums, with about 15*l.* or 18*l.* on account of light dues, were paid by him since the institution of the suit, 14th May, and without authority or directions from the master; that Carnevalli well knew, from the time of their appointment, that Marcher & Co. were the duly appointed agents of the ship, and were ready to act in that capacity; and moreover, when they, on the 23d March, informed him that they, as such agents, would repay him any advances he had made on account of the ship, he replied that he had made no such advances, and had no claims on the ship.

The reply of Mr. Carnevalli alleged, that, on the 22d March, the master, Forshall, in writing, appointed him, Carnevalli, to act as agent of the ship, at the same time delivering to him (as is customary with masters of foreign vessels) the log-book and other papers; that the master did not appoint Marcher & Co. to [ \* 267 ] act as his agents, or authorize them in any manner to interfere in the affairs of the ship, nor did Carnevalli ever recognize them as the agents of the ship, or admit to them that he had made no advances to the ship, and had no claim on her owners; that, at the request of the master, he engaged a steamer to go out to the vessel, and tow her from the Spurn Light into Grimsby, for which he paid, on the 23d March, 5*l.* 5*s.* (and not 25*l.*, as erroneously alleged by him in the act;) that on the 26th April he paid 17*l.* 2*s.* 10*d.* for light dues and buoyage; that he paid the 30*l.* to the fishermen on the 23d March; that he engaged lighters to take out part of the cargo, the bill for the use of which, amounting to 8*l.* 5*s.*, was delivered to him on the 28th March, though not paid until the 19th May; that 47*l.* was paid by him to the laborers employed in taking out the cargo, during the progress of the work; that he advanced to the master, on the 23d March, 100*l.*, on the 14th April, 20*l.*, on the 1st May, 10*l.*, and on the 5th May, 51*l.* 5*s.*, and that he expended, in travelling expenses to Hull and London, on matters connected with the ship, 13*l.*, making together 194*l.* 5*s.*; and with reference to the averment of the master's having been superseded, it alleged, that, on the 21st December, 1848, Forshall



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being at Falmouth, where he had called for orders, received a letter from the managing owner of the vessel, dated 30th November, directing him to charter his vessel for the Mediterranean, and thence home, and he accordingly, on the 10th April, signed a charter-party, whereby he agreed with Mr. Carnevalli that the ship should proceed with coals to Malta, thence to Genoa, where he was to take in marble [ \* 268 ] and silk for St. Petersburg, with a penalty of \*700*l.* for non-fulfilment of the agreement, which, it alleged, was binding on the owners, who, by reason thereof, had no power to supersede Forshall in command of the ship (save with the consent of Carnevalli) until after the fulfilment of the charter-party; that on the 14th April, Forshall received information from the Russian consul that he had been superseded, and on the 28th April a copy of a letter from the owners was forwarded to him by the consul; but as he had not received any other instructions from his owners, who were not aware that he had, as directed by them, executed the charter-party, he continued to act as the master; and as the owners, through their agents, had refused to carry out the charter-party, he, Carnevalli, held the log-book and ship's papers as security.

The rejoinder alleged that, on the 23d (22d) March, Forshall, the master, signed the usual pilot's certificate, and therein desired Marcher & Co. (whom he had previously appointed his agents) to pay the pilotage dues; that two of the clerks of Marcher & Co. went to Grimsby, accompanied by Forshall, to report the vessel, when he signed at the custom-house there the usual declaration, in which he described Marcher & Co. as his agents, on which day such appointment was made known to and recognized by Carnevalli; and a few days after the master, accompanied by one of the said clerks of Marcher & Co., delivered to the Russian consul the register and ship's papers, the log-book being unduly and collusively delivered up by the master to Carnevalli; that the buoyage dues, 14*s.* 4*d.*, were paid, on behalf of Marcher & Co., on the 20th April, and the men employed in lightening the vessel were paid on the 24th March, by or [ \* 269 ] on behalf of Marcher & Co., from \*whom the master had received, on his application at various times on and between the 24th March and the 23d April, advances for the use of the ship, amounting to 45*l.*, made by Marcher & Co. in the character of agents; that, between the arrival of the ship at Grimsby and the discharge of the master, the crew received from him 4*l.* 6*s.* only; that, on the 27th January, 1849, the managing owner of the ship sent a letter to the master (the letter referred to in the reply) which recalled the orders of the 30th November, and directed him to proceed home in ballast, and that such letter was received by Forshall long prior to the 10th April;

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that the charter-party is not binding in law on the owners, who were not precluded from superseding the master, and that he, on the 22d March, was informed in the office of Marcher & Co. that his owners had sent Captain Ravender to supersede him; that, on the 25th March, Ravender informed Forshall of his having been superseded, and exhibited the power of attorney and instructions of the owners to that effect, whereupon Forshall removed his clothes from the ship and took up his residence in Hull; that on the 21st April he wrote to Captain Ravender, formally delivering up the command of the vessel from that date.

A surrejoinder and a rebutter contained sundry denials and explanations, but no additional facts.

*Jenner*, for the party suing, contended that the supplies and advances actually made to the ship, under the authority of the master, were recoverable under the statute, citing *The Lusitano*, 1 Rob. jun. 166.

*Addams* and *Twiss*, for the owners, resisted the suit on the \*ground that it was a case of flagrant collusion and fraud [ \* 270 ] between the pretended agent and the displaced master of the ship.

#### JUDGMENT.

In this case the action is brought by Mr. Louis von Carnevalli, a shipping agent residing at Grimsby, for moneys supplied and disbursements alleged to have been made for the use of this vessel. The ship is a foreign ship, and the action is brought under the stat. 3 & 4 Vict. c. 65. It is therefore incumbent upon the plaintiff to prove that the disbursements and advances were not only made, but also that they were necessary. An act on petition has been given in, setting forth the various sums which are asserted to have been advanced. The defence of the owners, as contained in the answer, is, that upon the arrival of the vessel at Grimsby, the master appointed Messrs. Marcher & Co., of Hull, as his agents, who acted as such accordingly; that their appointment was well known to Mr. Carnevalli, and that on or about the 23d March, Messrs. Marcher & Co. informed him that they would repay him any advances he had made, and that he disclaimed having made any. The advances themselves are also controverted in part, and it is alleged that some of the sums asserted to have been advanced have been paid since the institution of the present suit. In the reply, most of these averments are directly put in issue, particularly the appointment of Messrs. Marcher & Co. as

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agents. Then follows a long statement of items alleged to have been paid, and the reply concludes with a detail of the circumstances under which a charter-party was entered into between Forshall, the master, and Mr. Carnevalli, and in virtue of which charter-party [ \* 271 ] \* it is contended that the owners had no power to supersede the master in the command of the vessel. A rejoinder follows, alleging facts to prove that Marcher & Co. were appointed agents, and that the appointment was known to Carnevalli, and a correspondence is introduced to show that the charter-party was not binding upon the owners, and that a person named Ravender was sent down by them for the purpose of superseding the former master in the command of the vessel. And then comes, I am sorry to say, a surrejoinder, setting forth a variety of facts which it is not necessary for me to notice in detail, saving the averment that, on the 23d of March, Messrs. Walker & Lundgren, who acted for Marcher & Co., offered to take the business into their own hands, and to repay Mr. Carnevalli for his expenses and trouble, but which offer he positively declined.

The pleadings in the cause are concluded by a rebutter, and in support of these pleadings three affidavits have been brought in on behalf of Mr. Carnevalli, and sixteen on behalf of the owners.

Such being the general outline of the pleadings in the cause, and of the case which is set up on one side and the other, the primary issue which I have to determine is, whether the appointment of Messrs. Marcher & Co. is duly established in the present instance. The claim of the plaintiffs being against the ship on account of disbursements made for her service, and upon the credit of the ship, if such agency is established, and it should be proved that there was an agent of the ship ready to make the necessary payment on the personal credit of the owners, and to repay whatever might have been previously disbursed, such an action as this could, I con- [ \* 272 ] ceive, with \* difficulty be maintained. I will now first advert to the affidavit of Mr. Carnevalli. In that affidavit he states, that on the arrival of the ship in Grimsby Roads, the master applied to him to act as his agent, and that he made the appointment by the paper marked A, annexed to his affidavit, and which was drawn up by Carnevalli himself. The paper in question is to this effect:—"I, the undersigned, commander of the Russian ship Helena Sophia, hereby engage Mr. L. V. Carnevalli, of this place, as my ship broker, and also authorize him to act for the best of the ship's interest, which is now in the road under average, and in a leaky state; and I further empower him to call a survey on board of my ship for the purpose of having her immediate discharge effected; in fact, to do all and every

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business concerned with the average of The Helena Sophia, laden with wheat from Odessa, and bound for Leith; and I promise to refund Mr. L. von Carnevalli all such moneys and commissions which he will have to pay by my order for The Helena Sophia, out of the freight and average appointments." Although the master confirms the appointment of Mr. Carnevalli under this document, in his affidavit, it is, I think, somewhat singular, that throughout the whole of the evidence it does not appear that this paper was produced to any one before the institution of this suit. Several occasions occurred when, according to all probability, it would have been produced if in existence. How this should have happened I am utterly at a loss to conceive, but, even assuming the existence of the paper marked A, at the time it purports to be dated, I must observe that it might be a question deserving of very grave consideration, whether an agent accepting an agency on such conditions, namely, of being repaid out of the freight and average \* apportionments, could [ \* 273 ] proceed against the ship for disbursements and advances.

I need not, however, stop to discuss this question at the present moment, as it is not necessary for me to decide it, my decision in the case must depend upon other considerations. Assuming then that Mr. Carnevalli was appointed agent as stated, I am clearly of opinion that he might, by competent authority, namely, that of the master or the owners themselves, or other persons authorized to act for them, have been removed, and another agent appointed, but then it would be but just that his disbursements should be repaid and a proper reward allowed to him for his services. The question therefore is, whether such an appointment was made or not; and this brings me to consider, in the next place, the affidavit of Messrs. Walker and Lundgren, one of them, the managing clerk, and the other a clerk in the establishment of Messrs. Marcher & Co. Mr. Lundgren states that on the arrival of the ship at Grimsby, he had an interview with Forshall, the master, and arranged with him that Marcher & Co. should act as the agents for the ship, and Forshall accordingly accompanied him to Marcher & Co.'s establishment at Hull, and the two deponents say, that on his arrival an agreement was made through them that Marcher & Co. should so act, and they were both present at Grimsby on the 23d of March, and heard Forshall inform Carnevalli that he had engaged Marcher & Co. as agents, and at that time Walker asked Carnevalli if he had made any payments or had any claim against the ship, and he distinctly stated that he had paid nothing and had no claim to make; and Lundgren swears that, on the 22d of March, he saw Forshall sign an order upon Marcher & Co., as the agents of the ship, to pay 30%. \* to a [ \* 274 ]

fisherman for towage and other services rendered to the ship, and which payment was made by Marcher & Co.; and Walker lastly swears that, on the 23d of March, Carnevalli asked him to let him act as sub-agent for the ship, and as deputy for Marcher & Co., but that he distinctly refused to employ him. In the first affidavit of Carnevalli, he positively denies these several averments, and the master also in his affidavit denies that he ever appointed Marcher & Co. to act as agents for the ship, and that he applied to Carnevalli and received from him the advances of money which were required; at the same time it is to be noticed, that in his second affidavit he admits that he did receive from Marcher & Co. an advance of money, amounting to the sum of 45*l.*; but this he states he did not receive from them as agents of the vessel, but as the bankers of the owners in Russia, as they represented themselves to be. In this conflict of evidence, in order to ascertain which is the most credible statement, I must now look to see whether the affidavit of Messrs. Walker and Lundgren be confirmed, or that of Messrs. Carnevalli and the master be contradicted by the remainder of the evidence in the cause. First, then, there is the affidavit of Mr. Newbold, the cashier to the house of Wilson & Co., merchants at Hull, and he swears that the master called at the house of his employers, and arranging that they should act as agents for the ship, received from them the sum of 15*l.* on the ship's account. Nothing is said of this in the act on petition. Mr. Newbold further states, that on the 23d of March, he had an interview with Carnevalli at Grimsby, and that he informed him that

Forshall had appointed Marcher & Co. the agents for the [ \* 275 ] ship and that he had applied to them to act as their \* sub-agent, and that Walker, their clerk, had told him that they did not require his services. If this witness is to be believed, he does confirm Messrs. Walker and Lundgren in the most important particulars, namely, the admission of Carnevalli himself that he had applied to be employed as sub-agent to Messrs. Marcher & Co. in the concerns of the vessel, thereby distinctly acknowledging the appointment of these persons to act in the capacity of agents. I have now to refer to the second affidavit of Messrs. Walker and Lundgren, which in many of its details is a repetition of the first. They state, however, in their affidavit, in addition to the averments to which they have already deposed, that they not only reported the ship, which it was the act of an agent to do, but Forshall, the master, signed the declaration which contained the names of Marcher & Co. as agents, and they annex a copy of the declaration to prove it. They also state, that Mr. Lundgren accompanied the master with the register to the Russian consul, and that Marcher & Co. paid various sums to the



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The Helena Sophia. 3 W. Rob.

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master, and that he, the master, directed the pilot to apply to them for the pilotage. All these facts are, in my opinion, most distinctly proved, and most important facts they are as tending to show that Marcher & Co. were the agents, and consequently that Carnevalli was not the agent of the ship. In such a matter as this, there could be no plausible reason for two distinct and separate agents. The supposition is inconsistent with all probability, and such a double appointment would have been altogether unwarranted. Without further travelling into the evidence, then, I am satisfied that it is distinctly proved that Marcher & Co. were appointed agents, and Carnevalli was not. Having arrived at this conclusion, I might

\* abstain from making any further observation in the case, [ \* 276 ] for, as I have already intimated, it would be very difficult to maintain an action against the ship for money and necessaries, where there is an agent ready to supply the funds requisite for all purposes, and who, moreover, had offered to discharge all just demands. To allow an action under such circumstances would open the door very wide to collusive demands, and to the unnecessary and unjust detention of foreign ships. I wish it, however, to be understood, that I do not intend to lay down the law upon this question upon the present occasion, nor to rest my decision entirely upon any such proposition. I look to other circumstances, and principally to the demand itself. The advances alleged to have been made are as follows, on the 23d March, 100*l.*; 14th April, 20*l.*; 1st May, 10*l.*; 5th May, 51*l.* 3*s.*; travelling expenses, 13*l.*; making together the sum of 194*l.* 5*s.* Besides these advances to the master, are the sums which are said to have been for the ship, and which amount, according to the schedule, to 108*l.* 2*s.* 10*d.*, making in the gross total the sum of 302*l.* 7*s.* 10*d.* Let us see how these demands are supported by the affidavits. There is, in the first place, in the act on petition, the demand of 25*l.* for the steamer, for the use of which it is admitted in the affidavit that the sum of 5*l.* 5*s.* only was paid. What is this but an admitted fraud. Again, in the act on petition, 212*l.* is claimed for advances, whereas in the affidavit it is admitted that 181*l.* only was paid, making a difference of 31*l.*

In regard to the advances, it is deserving of notice that the first demand is alleged to have been made on the 22d of March, the very day on which the ship arrived at Grimsby. Is it consistent with any \* degree of probability that the sum in question [ \* 277 ] should have been so advanced? I think not. I think no honest man of business, in his senses, would have advanced to a foreign master the sum of 100*l.* the very day of his arrival in port, and that master an entire stranger to him; of the application of this



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The Fleece. 3 W. Rob.

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money, and the purpose for which it was wanted, I have not a single word of evidence. But if it were advanced as stated, I have a right to expect vouchers for the same, and there is none before me, but a general statement of the master, to which, I think, no credit can be attached. Can it be imagined that this court, intrusted with new powers under the statute, for the double purpose of facilitating credit for foreign ships, and at the same time protecting British merchants and tradesmen who make *bonâ fide* advances, and become creditors for necessary repairs and expenses, should consider such advances as these, even if made, just and necessary advances? Assuredly not. All the other advances said to have been made, if made at all, were made after Mr. Carnevalli knew there was an agent appointed, willing to make all necessary disbursements, and after the master was displaced. To complete the case, Mr. Carnevalli pretends to enter into a charter-party with a master, whom he well knew (as far as I can collect from the *res gestæ* and the evidence) was about to be displaced. The result is, that I pronounce against this claim, and with costs, being well satisfied that the claim has no foundation in truth and justice, and that Mr. Carnevalli and Forshall, the displaced master, have conspired together to set up a fictitious and fraudulent demand against this vessel, and to support it by misrepresentation and false swearing. .

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[ \* 278 ]

\* THE FLEECE.<sup>1</sup>

April 24, 1850.

Where salvors are embarked in a salvage service with the consent and sanction of the master of a stranded vessel, and are disturbed in their salvage operations, and are ousted from the vessel by persons illegally intruding themselves into the service, no salvage benefit can accrue to the parties so intruding themselves, for any portion of the ship and cargo they may save, but the same will accrue to the original salvors.<sup>2</sup>

THIS was a cause of salvage, brought against the ship and her cargo by the masters, the owners, and crews of four smacks, and by the commander, officers and crew of her Majesty's revenue cutter Scout.

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<sup>1</sup> [S. C. 7 Notes of Cases, 534.]

<sup>2</sup> [See *The Blenden Hall*, 1 Dod. 414, note, for cases as to interference with salvors.]

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The Fleece. 3 W. Rob.

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The vessel, it was stated in the act on petition, bound on a voyage to London, with a cargo of hemp and tallow, and having got upon the Gunfleet Sand, was fallen in with by the salvors on the 7th of October last. Whilst so grounded, the services of the salvors were accepted by the master, and the vessel was got off the sand, and in consequence of her making water fast she was run ashore at the Maze, off the Essex coast, and the original salvors were occupied in unloading the cargo until the 9th. On the morning of that day a large number of men took forcible possession of the ship, and although warned that the salvors were in legal charge under the sanction of the master, and in spite of endeavors to prevent them, they got out some of the cargo, and having cut away the standing rigging, and taken away the bower anchor, they finally left the brig, which, in consequence of bad weather, &c., on the 12th became a total wreck, and was sold by order of the owners. The cargo so rescued consisted of twenty-eight bags of tallow and 13,547 heads of hemp.

The answer of the owners denied that more than three casks, and about thirty-four cwt. of tallow were saved by the alleged salvors, the remaining portions, some of which had been received by the owners, being saved by the persons who had so taken possession of the ship. That twenty-seven of these persons had \*been [ \* 279 ] since prosecuted, and convicted and fined; and that the owners were entitled to deduct from the value of the property saved, the expenses to which they had been put in following up the prosecution, and also the expenses of the insurance and the amount of the freight.

For the salvors, *Queen's Advocate* and *Haggard*.

*Addams* and *Twiss, contra*.

#### JUDGMENT.

DR. LUSHINGTON. It appears that in this case the salvors, whose merits are not denied, came to the rescue of this vessel early on the morning of the 7th of October last, and that they continued so employed in her service until the 9th of the same month, when they were disturbed in their operations by the forcible interference of the "wreckers," as they are termed in the proceedings, who dispossessed them of the vessel, and prevented them from continuing the means they had intended to adopt for salving the ship and cargo. By the agency and exertions of the persons who had thus wrongfully obtruded themselves into the service, certain portions of the cargo were recovered and came into the possession of the owners, who to that extent are

undoubtedly benefited by their act. The question now is, whether any salvage at all is due for the property so recovered, and if so, to whom it should be awarded.

With respect to the alleged wreckers, it could not I apprehend, be for a single moment contended that persons so unlawfully intruding themselves, and by force dispossessing salvors of a [ \* 280 ] vessel and cargo in \* their care and charge, could derive any salvage benefit from their own misconduct. It is clear they would have no *persona standi* in this court, and any claim which had been asserted on their behalf must have been dismissed with costs. Are then the original salvors entitled to the benefit of their exertions under the circumstances of the case? In the case of *The Blenden Hall*,<sup>1</sup> reported in the first volume of Sir John Dodson's Reports, it has been distinctly laid down by Lord Stowell to this effect, namely, "that persons dispossessing original salvors without reasonable cause, shall receive no benefit from the services they may afterwards perform, but the whole reward shall go to those who have been wrongfully dispossessed; those who are wrong-doers shall take no benefit from their own wrong; the exertions they may use in bringing in the ship shall enure not to their own profit, but the profit of those who would otherwise have performed the service." Entirely acceding to the principle thus laid down by Lord Stowell, and on which I shall at all times be disposed to act, I have now to consider whether there is any substantial distinction between the case of *The Blenden Hall* and the present case.

*The Blenden Hall* was found derelict by a post-office packet, and was taken possession of by the master and ten of his men, who, having cleared the ship from water, and set her to rights in other respects, were conducting her to the port of Falmouth, when they fell in with a brig of war, *The Challenger*, the captain of which vessel sent a master's mate and nine hands on board to conduct the vessel to Plymouth, where she arrived in safety. The salvage service, therefore, in that case as in the present, had not been completed, but was [ \* 281 ] in the course of completion; \* and here I would observe, that in my opinion it matters not at what period the salvors are dispossessed. I go the whole length of laying down this principle, that where salvors are on board a ship in distress, and their services have been accepted by the master, if, before they have done one stroke of work, they are forcibly dispossessed (without the concurrence of the master) by any persons who in any manner save the ship or cargo, or part of the same, the alleged second set of salvors can earn nothing

<sup>1</sup> [1 Dod. 414.]

for their own benefit, but every act done and every service performed by them must enure to the benefit of the original salvors. I am, therefore, clearly of opinion that, under the circumstances of the present case, the original salvors are entitled to a salvage reward upon the whole of the salvage service which has been done ; it only remains to be considered what the amount of that reward should be under the circumstances of the case. The whole value of the property which has been rescued, according to the account sales, amounts to the sum of 1,888*l.* ; from this sum, however, certain deductions are claimed by the owners on account of expenses incurred by them ; and amongst the deductions they claim the expenses incurred by them in prosecuting an action which was successfully instituted against the wreckers, who took forcible possession of the ship and cargo. With respect to the expenses of this prosecution, I have no hesitation in saying that it can form no item of deduction in the case. It was incumbent upon the owners, as a public duty, to prosecute, where an offence of such a kind had been committed ; and it cannot with any justice be held that the salvors should receive less than their adequate reward on account of the expenses which the owners have \*incurred in [ \* 282 ] that prosecution. I regret to find that the persons so grossly misconducting themselves were only fined. In my opinion a communication ought to have been made to the Lords Commissioners of the Admiralty, who, I am satisfied, would have directed the prosecution to have been conducted by their own officers, in which case something more than a fine, I apprehend, would have been inflicted upon persons guilty of such lawless conduct. If such a case should occur again, I shall most unquestionably direct that an official communication be made to their lordships upon the matter. Another item in the deductions claimed by the owners of the cargo is the sum of 229*l.* paid by them on account of the freight. This sum I am also of opinion cannot be deducted in the present instance. It is clear that salvors, generally speaking, are entitled to salvage upon ship, cargo and freight ; and as far as the owners of the cargo are concerned, it can, it appears to me, make no difference to them whether the salvage is taken from the freight itself or from the cargo as it is sold, which includes of course the value of the freight. So that supposing the owners of the cargo were compelled to pay this 229*l.* on account of freight to the owners of the ship, as in the present instance, they will have to pay so much less for their portion of the salvage. With respect to the item of the insurance, I am of opinion that it does not form a proper subject of deduction. Allowing the other deductions which are claimed, the property out of which the salvage remuneration is to be paid must be taken at the sum of 990*l.* Out of this sum, looking at

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The Clarence. 3 W. Rob.

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the danger the property was in, and the nature of the service, I shall award the salvors the sum of 300*l*. The service, I am clearly [ \* 283 ] of opinion, was a \*very meritorious service in the first instance, and not the less so because Lieutenant Saxby and the persons on board the smacks abstained from any acts of violence, although they would have been justified in retaining possession at whatever risk. They acted, however, most laudably in abstaining from so doing, because if they had not so abstained an affray would have taken place, and in all probability bloodshed would have ensued.

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THE CLARENCE.<sup>1</sup>

May 14, 1850.

Where a party who has received a damage by collision, claims to be indemnified for a consequential loss, arising from the non-employment of his vessel whilst under repair, he is bound to prove that he has sustained a direct and positive loss; it will not be sufficient to aver that the vessel, if she had not been detained in dock, might have earned certain probable freight.<sup>2</sup>

Claim of a steam company for demurrage, at the rate of 20*l*. per diem during the repairs, as being the amount at which the vessel might have been hired, not allowed by the registrar and merchants, and the objection to their report upon this ground overruled.

THIS was originally a cause of damage by collision, promoted by the owners of the brig Catherine, against the steam-vessel, The Clarence. A cross-action was subsequently entered by the owners of The Clarence, and the court, having pronounced that both vessels were in fault, referred the amount of damages to the registrar and merchants in the usual form.

The registrar and merchants in their report allowed the full amount of the damage claimed by The Catherine, namely, the sum of 643*l*., and reported the loss of The Clarence in the sum of 118*l*. 18*s*. 10*d*., disallowing in the claim of the latter the sum of 260*l*., charged for demurrage by the detention of the vessel, whilst under repair, from the 1st to the 13th of August, at the rate of 20*l*. per diem.

In objection to the report,

*Addams* and *Robinson* submitted — That the fact of the Steam Navigation Company having other vessels, which they might have

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<sup>1</sup> [S. C. 7 Notes of Cases, 579.]

<sup>2</sup> [Williamson v. Barrett, 13 How. 101.]

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The Clarence. 3 W. Rob.

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employed in the line of voyages in which The Clarence \* was engaged, was no ground for disallowing the claim [ \* 284 ] which was made by the company in the present instance; that the loss was sustained is to be inferred from the fact of the vessel being laid up, and the claim now made came clearly within the principle laid down in the case of The Hebe; that the case of The Hebe was a case precisely in point, and the doctrine laid down by the court in that case was, "that the owner of the vessel run down is entitled to demurrage, upon the calculation of what would have been the probable amount of the earnings of the vessel during the period of her actual detention."

*Dodson and Harding, contra* — That the owners of The Clarence had not proved that any loss had been actually sustained by the detention of The Clarence; that although it was true that a party receiving a damage by collision was entitled to be indemnified in the consequential loss arising therefrom, such loss must be a direct and positive loss, and not a loss which might by possibility have arisen; that the Steam Navigation Company had the opportunity of establishing this loss in the present instance, if they had been able to do so, but had entirely failed in this respect; and consequently they had not discharged the *onus probandi* which lay upon them.

PER CURIAM.

In this case an action for damage by collision was originally entered by the owners of The Catherine against the steam-ship, The Clarence, a vessel belonging to the General Steam Navigation Company. A cross action was also subsequently entered by the \* owners of The Clarence against The Catherine, and upon [ \* 285 ] the hearing of the cause the court pronounced that each party was to blame, and referred the amount of damage mutually sustained by the respective vessels to the registrar and merchants. Upon the 22d of February, the registrar returned his report, and this report has been objected to by the owners of The Clarence, upon the ground that the registrar and merchants have disallowed the sum of 260*l.*, claimed by them as demurrage for the loss of employment of their vessel during the time she was detained in dock whilst undergoing the necessary repairs. The sum of 260*l.* so claimed is made up of a charge of 20*l.* per day during the period in question, and this charge, it is alleged, is a reasonable charge, looking to the character and ordinary occupation of The Clarence, and to the average earnings of vessels of her size and description. In order to ascertain the propriety of the demand which is thus made on the part of the own-



ers of the steam-vessel, I must now proceed to consider the evidence which they have adduced in its support, for although upon general principle the party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered, yet in all cases he is bound to prove that he has actually sustained the loss he alleges, and he must also supply the means of ascertaining its amount.

The evidence produced before the registrar and merchants in the present instance is to be found in the affidavits of Mr. Pratt and Mr. Adams. The former of these gentlemen describes himself as assistant surveyor to the General Steam Navigation Company, and he states that the claim is a moderate claim, and that the company [ \* 286 ] have received much \* more per diem for the hire of their per steamers, and he mentions an instance, in 1842, of 60*l.* diem having been paid. Now what Mr. Pratt states may be very true, namely, that the sum of 20*l.* per diem is a moderate charge for the hire of such a vessel as *The Clarence*. His affidavit, however, does not go to the real question which is before the court. The question which I have to determine is not the rate at which such a vessel as *The Clarence* might be hired, but how much the company have actually lost by her detention whilst under repair. Upon this point the affidavit of Mr. Pratt is altogether defective, and he does not venture to swear that the company have sustained one single shilling of direct and actual loss. In order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary—actual loss, and reasonable proof of the amount. Both must be proved, for the registrar and merchants cannot report a loss sustained without evidence. The second witness, Mr. Adams, who states himself to have been a manager of a steam company, and well acquainted with the earnings of steam-vessels, does not advance the case in the slightest degree. He leaves it exactly where it was left by Mr. Pratt, and does not prove any direct or actual loss at all. Under these circumstances I have no hesitation in saying that I must overrule the objection which has been taken, and confirm the report of the registrar. The objection, it appears to me, has been founded upon a misapprehension of the principle upon which the court proceeds in assessing the amount of damage. It does not follow, as a matter of necessity, that any thing is due for the detention of [ \* 287 ] a vessel whilst under repair. Under some \* circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed. The *onus* of proving her loss rests with

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The Commerce. 3 W. Rob.

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the plaintiff, and this *onus* has not been discharged upon the present occasion. Had the owners of *The Clarence* proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted; I therefore pronounce against the objection, and confirm the report with costs.

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THE COMMERCE,<sup>1</sup> Krehft.

May 24, 1850.

Where there is a probability of a collision, a vessel on the larboard tack, and closehauled, is not justified in pertinaciously keeping her course, although the vessel she meets is on the starboard tack, and with the wind free. Where practicable, she is bound to take the necessary precautions for avoiding the collision, although the other vessel is acting wrongfully in not giving way in time.<sup>2</sup>

A closehauled vessel on the larboard tack, and a starboard tacked vessel with the wind free, meeting each other, and neither vessel giving way in time, both vessels held to be equally at fault.

THIS was a cause of damage, brought by the owners of the ship *Tay* against this vessel, her tackle, &c.

The collision took place in the English Channel between 3 and 4, A. M., of the 11th of March. Upon the 13th of March an action was entered by the owners of *The Tay*, in the sum of 2,500*l.*, and upon the 11th of April a cross action was entered by the owners of *The Commerce*, in the sum of 1,200*l.*; both actions to be determined by the decision in this case.

The circumstances under which the collision took place, as set forth in the act on petition, are in substance as follows:

That *The Tay*, a bark of 512 tons, was proceeding on a voyage from London to Cardiff in ballast, to load with a cargo of coals for Panama; that in prosecution of such voyage she arrived in the Downs \* on the afternoon of the 10th of March, and [ \* 288 ] continued her course down the Channel, and was off Beachy Head about 2, A. M., of the 11th; Beachy Head light bearing N. by W., distant about ten or twelve miles; that the larboard watch was set at midnight, consisting of the mate and nine others; the master also being on deck, and all keeping a good and careful look-out; that

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<sup>1</sup> [Confirmed on appeal. See note at the end of the case.]

<sup>2</sup> [*The Hope*, 1 W. Rob. 154, 157.]

the night was starlight and clear, and vessels, particularly those with a light, could be seen at a considerable distance; that, being in the Channel, the master, as an additional precaution, had, besides the binnacle lamp, the night signal lanthorn, with two lights in it, suspended from the larboard foretopmast stay, being the most conspicuous place over the bow, which gave a brilliant light, and could be seen easily a great distance off; that the bark held a course W. by N., the wind blowing a steady fresh breeze from N. to N. by W. and was closehauled by the wind on the starboard tack; that shortly after 3, A. M., the look-out man on the lee bow called out, a light on the lee bow, whereupon the master, who was walking on the starboard side of the poop, and in consequence of the foresails and mainsail was himself prevented from seeing the light, called out to the chief mate to be careful and see what tack the sail was on; that the mate, having ascertained that the vessel so reported was to leeward, and would go clear of The Tay, was about to leave the forecastle to report the same to the master, when one of the men on the look-out forward saw a vessel almost right ahead, but a little on the lee bow of The Tay, and called out, "a sail right ahead;" that the mate and the said look-out man, seeing that the vessel so approaching was on the larboard tack, and was approaching The Tay in such a [ \*289 ] \*direction, that unless she altered her course a collision would in all probability take place, called out to the master that the vessel was on the larboard tack, and to port his helm; that the master thereupon ordered the helm of The Tay to be ported a little, which was done, and her sails began to lift, and all hands forwards loudly and repeatedly hailed the other vessel, to wit, The Commerce, the vessel proceeded against, to port her helm, and had she so done, as she was in duty bound to do, the collision would not have taken place; that, notwithstanding such hailing, however, she came rapidly down upon the Tay, which was to windward of her, under full sail, and with a starboard helm, ran with great violence into her; that the master, hearing the watch call to the approaching vessel to port her helm, stooped down, and looked under his mainsail and foresail, and seeing The Commerce with her jib-boom coming on close to the larboard bow of The Tay, put his helm hard a-port, in order to lighten the blow, notwithstanding which The Commerce in about five minutes from the time of her being first seen struck The Tay on her larboard bow, cutting her down from her gunwale to her copper, one foot above the water's edge, breaking the larboard anchor stock head, rails and knees, springing the bowsprit, and starting the decks, besides doing other considerable damage.

On the part of the owners of The Commerce, it was alleged in

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answer that *The Commerce*, a Prussian bark of 381 tons, on her voyage from Torrevechia to Memel, with a cargo of salt, at half-past 3 of the morning of the 11th of March, was sailing under topsails and top-gallant sails, courses, jib, flying jib, gaft topsail, spanker, mainboom sail, and foresail, and \*as close hauled to the [ \* 290 ] wind as she could be upon the larboard tack, having the wind at N. E. by N., varying a little more to the east, and not a steady fresh breeze from the N. by W., as alleged; that under the circumstances, a strange sail was seen about two or three points open on the bark's starboard bow, coming down channel with the wind free; that the mate immediately went forward to the starboard fore-rigging, to keep the said strange sail in sight, and at the same time cautioned the man at the wheel to keep the bark (as she was) close to the wind, and not let her fall off any, which was accordingly done; that the strange vessel, which proved to be *The Tay*, continued approaching *The Commerce*, without any alteration of her course, until she came to within about three or four times her own length of that vessel, when her helm was suddenly, and most improperly, put to port, whereby she was luffed up on the wind across the bows of *The Commerce*; that she was thereupon loudly hailed by the mate of *The Commerce* to keep her luff, but which hailing was disregarded, and immediately afterwards she came with great force into collision with *The Commerce*, &c.; that no blame whatever was imputable to those on board *The Commerce*, inasmuch that, at the time of the collision, and for some time previous thereto, *The Tay* was going free, and *The Commerce* was close-hauled, and it was consequently the duty of *The Tay* to have kept clear of and given way to *The Commerce*, either by keeping to leeward of her or otherwise.

The case was argued on behalf of *The Tay* by

*Robinson and Twiss.*

\* *Addams and Bayford, contra.*

[ \* 291 ]

PER CURIAM.

DR. LUSHINGTON. Gentlemen, the evidence in this case is extremely contradictory, and it is no easy task to endeavor, from the best consideration of that evidence, to ascertain what is the true statement of the facts which are disputed. We must, however, address ourselves in the first instance to this difficulty; and having satisfied ourselves as well as we are able upon this point, we shall then have to consider what are the rules enjoined by the Trinity House with regard to vessels in the situation in which we must assume these two ves-

sels to have been placed; and, secondly, how far these vessels have, one or both of them, complied with or violated these rules. Gentlemen, there are some facts in the case which I must point out to you in the outset of my observations, as either admitted to be true, or which are not capable of being doubted. Such, for instance, are the facts which relate to the tonnage of the respective vessels, to the tacks upon which they were sailing, to the competency of the watch stationed on the part of each vessel; and, moreover, that the master of *The Tay* was upon the deck at the time when the collision took place. Respecting these facts there can be no doubt, and I think it is also equally clear that, previous to the collision, *The Tay*, being on the starboard tack, did put her helm a-port. Whether she ought to have done so at all, whether she did so sufficiently or in due time, will form the subject of consideration after we have looked at the other facts in the case. Gentlemen, it is moreover equally clear what *The Commerce* did, being on the larboard tack. Upon that point,

the statement of Edward Becker, who had the charge of [ \* 292 ] \* the helm of *The Commerce*, is to the following effect: he

says, "that the mate immediately went forward on the starboard side, after the cry had been raised of a sail ahead on the starboard bow," and at the "same time cautioned me strictly to mind and keep the bark as she then was, close to the wind, and to be sure not to let her fall off any; and I most positively make oath that I strictly obeyed such orders, and kept the said bark as closehauled as possible to the wind, without the slightest alteration of the helm." From the evidence of this witness, then, it is manifest that he did not port the helm, but kept her close to the wind. There is, you will perceive, gentlemen, a statement on the other side directly at variance with this statement, that *The Commerce* was kept, as she was, closehauled. It is stated, on the part of *The Tay*, (how far such statement is credible or consistent with the other facts of the case, I will not at present say,) that the helm of *The Commerce* was starboarded, and in consequence thereof the accident was occasioned.

Let us now look to the facts of the case in relation to the wind. Let us suppose that the wind blew either from the north or north and by west, as stated by the owners of *The Tay*, or from N. W. by N., which would be an intermediate point; or from N. E. by N., which would be the quarter stated on behalf of the owners of *The Commerce*. If, gentlemen, in all of these cases, *The Commerce* ought to have given way, then she certainly did not do so, and is consequently to blame. I have put the case thus to you for this reason, that it has been argued strongly on behalf of *The Tay*, that *The Commerce*, under the circumstances stated by himself, namely, that she was on

the larboard tack and closehauled, ought to have given way.

\* In support of this assertion, various cases were referred to [ \* 293 ] in the course of the argument; but I do not think it necessary to trouble you by a reference to those cases, because it is well known that cases of this kind differ from each other in little and minute points; and a small difference of circumstances might have influenced the nautical gentlemen upon whose opinion the judgment of the court in those cases was founded; it would, therefore, be extremely dangerous to select any one case as an absolute and conclusive authority in another case, unless, after a very narrow examination, the two cases concurred in the detail of all the circumstances. For this reason, without further reference to the cases cited, and still bearing in mind the position contended for by the owners of The Tay, we must, in the next place, consider what the state of the night was, and what was the state of the weather generally at the time and immediately previous to the collision in question. With respect to the first of these, it is abundantly clear, from the representations of both parties, that it was a perfectly starlight night. One vessel states that she descried the approaching vessel two miles off, and that vessel says that she saw the other a mile and a half distant; so that it is manifest it was a night on which, if there had been an ordinary good look-out, there was sufficient light to enable the party whose duty it was to give way, to have done so with perfect facility. Whether or not the position contended for by the owners of The Tay can apply to such a night as this, is a question of great importance, which you must take into your consideration.

If you shall think that, under the circumstances, it was the duty of The Commerce to have kept her course, I must say that The Commerce did keep her \* course, and is not to blame. [ \* 294 ] There is no satisfactory evidence to my mind that The Commerce did alter her course; and, supposing you to come to that conclusion, then the only remaining question will be what The Tay ought to have done, whether she ought to have ported or starboarded her helm, and ought to have done so at an earlier period.

With regard to the conflicting evidence and the credibility of the witnesses on the one side and the other, it is extremely difficult for us, who have had no opportunity of observing them or of putting questions to them, to judge with any great accuracy as to the credit due to one person or to another. I will now first take the evidence on behalf of The Tay, for this is a case in which I must occupy a few more minutes of your time, because it is a case in which the damage alleged to have been sustained is considerable, and it is also not unattended with difficulty.



The protest is made by Langwell, the master of The Tay, and five others, and is made immediately after the collision. It is dated on the 12th of March, and the collision took place on the 11th. It contains the whole of the facts and representations set forth on behalf of The Tay in the act on petition, from which I think there is no departure of any the slightest consequence throughout. The affidavit of the master is a mere repetition of this protest. There is also the affidavit of the mate, who was in charge of the watch. I have carefully looked over this affidavit, and I do not see that it departs in any matter of the slightest importance from the original statement contained in the protest. The same observation applies with respect to the evidence of

Blackie and Gillespie. With respect to the latter of these [ \*295 ] witnesses, he has \*joined in the protest, and subsequent thereto, by some means or other, of which the court is entirely ignorant, some person gets hold of him on the other side; and he, a marksman, and an ignorant seaman, makes an affidavit in support of The Commerce, which I have no hesitation in telling you is, in essential points, altogether in contradiction to his original statement.

What is to be the effect of this? To give any credit to this second affidavit would be to give credit to that which is entitled to none whatever. Therefore as to any affirmative benefit to the party who has procured it, I think there is none. The court is not pleased when it sees an attempt to bolster up a case, whether good or bad, by going into the enemy's camp to fish up an affidavit of this description. It is well known how men of this kind may be practised upon, and this court is at all times extremely adverse to the introduction of such affidavits, and is not disposed to attach to them any credit whatever when they are procured. With respect to the wind, if it be important, there is the affidavit of Nicholson, Read and Lockwood, of the brig Venus, stating that at midnight the brig was abreast of Farleigh, bearing N. N. E., distant about five miles, the wind being N. N. E., when the said J. Read and H. Lockwood came on deck to relieve watch, when Nicholson went below, and Read and Lockwood then proceed to swear that at 2 A. M. the wind turned round to N. by W., and so continued till about four o'clock, the brig lying all the while W. by N., close hauled, and the wind very scant, with a clear night. Such, gentlemen, is the whole of the evidence on the part of the owners of The Tay, the parties originally proceeding in the cause.

The evidence on the other side consists, in the first instance, [ \*296 ] \* of the protest, which details the facts with some minuteness. Before I proceed further, however, with the evidence of The Commerce, there is one statement in the case set up by The

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The Commerce. 3 W. Rob.

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Tay, to which I would direct your attention, in order to see whether we can derive any assistance from it in drawing our conclusions as to the matters of fact. The statement to which I allude is to this effect, that the helm was put hard a-port in order to break the force of the blow, notwithstanding which The Commerce, in about five minutes from the time of her being first seen, struck The Tay on her larboard bow, cutting her down from the gunwale to the copper, one foot above the water's edge, breaking the larboard anchor stock, head rails and knees, springing the bowsprit and starting the decks, besides doing other damage. Now I dare not myself venture to draw any conclusion or deduction from these premises, but I submit the statement to you, as persons of nautical experience, because it is a distinct account of the manner in which the collision took place, whereas on the other side the statement is not so distinct; it is merely stated that The Tay came with great violence into The Commerce, carrying away the bark's bowsprit head, stem, and bulwarks, &c. How she so came into collision, or in what way, is left altogether unexplained; it is not stated that it was with the stem or larboard quarter, but it is abundantly clear that the larboard bow of The Tay was the part of that vessel that was seriously injured. Gentlemen, whether you can form any opinion from this statement of facts, I cannot undertake to say, but it is my duty, in a case of this kind, not to omit pointing out to your notice any thing that may by probability tend to elucidate the facts which are not a little \*doubtful. To pro- [ \* 297 ]

ceed with the protest of The Commerce: it supports, you will perceive, the case set up by the owners of that vessel, more especially with regard to the wind, in respect to which it is also supported by the affidavit of Mr. Fennimore, the master of The Hope. It has been objected to Mr. Fennimore, that he does not speak with any precision as to the time when he made his observation with respect to the wind. To a certain extent the objection is well founded: at the same time I am bound to tell you, that the affidavit of Edward Wood, the pilot, fully supplies this deficiency, and his statement applies closely within the time. He says he was cruising in the cutter Pandora off Beachy Head, with the wind from N. E. by N.; that he was about twelve miles distant from the land, and in about half an hour afterwards, to wit, at about half past four of the same morning, he boarded the Prussian bark called The Commerce; he says at four o'clock the wind was N. E. by N.; if therefore, it is important in this case to determine from what quarter the wind blew, his affidavit is conclusive. The affidavit of the master may be dismissed without comment, as he was not on deck at the time. The same may be said of the affidavit of the carpenter and some of the seamen, who were be-

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The Bonaparte. 3 W. Rob.

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low. There is the affidavit H., the affidavit of the mate in charge and others of the seamen who composed the watch. I will not detain you by going through its details; it is sufficient to observe of it that it is an important affidavit, and supports with great precision all and every circumstance upon which the owners of The Commerce rely. There is, lastly, an affidavit of considerable bulk from others of the crew of The Tay, and another affidavit of the persons on [ \*298 ] board The Osiris, who were in the very neighborhood at the time the collision took place, but I do not think that any benefit can arise from discussing the statements of these parties. I have now, gentlemen, pointed out to you the evidence on the one side and the other respecting the facts and circumstances of the case, and as it is really a case of some little difficulty, I think we had better retire for a few minutes to consider our decision.

The learned judge and the Trinity Masters having retired for a few minutes, upon their return to the court the learned judge said, "We have considered this case, and we are of opinion that the wind blew from N. E. by N.; that it was the duty of The Tay to have given way, and she is to blame for not having done so. The Commerce is also to blame for not having made an effort to prevent the collision, which we think was in her power, and which, consequently, it was her duty to have done." Both vessels are to blame.

*Note.* This judgment was appealed by the owners of The Commerce to the judicial committee of the privy council, and the judgment of the court below was confirmed, and the appeal dismissed with costs.

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### THE BONAPARTE,<sup>1</sup> Anderson.

May 23, 1850.

A bond of bottomry upon the ship and cargo, granted by the master in the country where the owners of the ship resided, and with their consent, but without any previous communication with the owners of the cargo, upheld by the court. The opposition of the owners of part of the cargo, who were resident at Hull, the bond being given in a port of Sweden, overruled.

THIS was a cause of bottomry, brought by Messrs. Wilson & Co.,

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<sup>1</sup> [S. C. 7 Notes of Cases, Supplement, p. lv.]

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The Bonaparte. 3 W. Rob.

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of Kingston-upon-Hull, against this vessel, her freight and cargo. The bond was given by the master at Stromstad, with the consent and concurrence of the owners of the ship, who were resident at Uddevallah, in Sweden, and its validity was opposed by Messrs. Wilkinson & Co., of Hull, the owners of part of the cargo laden on board. [ \* 299 ]

The act on petition on behalf of the bondholders alleged in substance, that the vessel of the burden of 52  $\frac{13}{100}$  tons, sailed from the port of Gottenberg on the 13th November last, laden with a cargo of iron and deals, and bound on a voyage to the port of Hull, and in the prosecution of such voyage encountered much bad weather and severe gales, whereby the cargo on board her was shifted, and the vessel became leaky. That with much difficulty she was got into Romso Bay, in Sweden, and on the 1st of December she proceeded to Stromstad, when it was discovered that she had sustained so much damage in her hull and rigging, that it was necessary she should be repaired and refitted in order to enable her to complete her voyage to England, and for this purpose the cargo was discharged and the vessel was accordingly put into dock. That immediately upon the arrival of the schooner at Stromstad, the master went over to Uddevallah, a distance of sixty miles, or thereabouts, where the owners of the schooner (chiefly farmers) resided, to inform them of the injuries the vessel had sustained at sea, and to obtain instructions from them for his guidance, and also the necessary funds to pay for the repairs indispensable to the said schooner and the maintenance of the crew, but that the said owners then informed him, the master, that they had no ready cash, and that they could not furnish him with the necessary funds, and that he must get the repairs effected at Stromstad, and there borrow the requisite sum on bottomry of the schooner, her cargo and freight. That the master being thus unable to obtain money from his owners, and being \* totally unprovided with the necessary funds for such repairs and refittings, and being unable to raise and supply the funds on his own personal credit or that of the owners, applied to Mr. Torren, of Stromstad, to assist him in completing the repairs, and amongst other things to advance such sum as might be requisite for the payment of such repairs on bottomry, on the security as well of the vessel, the tackle, &c. as of the cargo laden on board. That Mr. Torren agreed to lend and did lend to the said master, on the aforesaid terms, the sum of 392*l.* 15*s.* 11*d.* sterling, for the use of the vessel as aforesaid, and the master did mortgage and hypothecate to the said Mr. Torren the said schooner, and also the cargo laden on board, and the freight to be thereafter earned for the transportation thereof, for the payment of [ \* 300 ]

the said principal sum of 392*l.* 15*s.* 11*d.*, at the rate of premium of 15*l.* per cent., amounting in the aggregate to the sum of 451*l.* 13*s.* 4*d.* British sterling. That the vessel was detained at Stromstad by reason of the severity of the weather, and as soon as the weather permitted she proceeded on her voyage to England, and safely arrived at the port of Hull on the 7th of April last. That Gottenberg and Udevallah and Stromstad are all ports situated in the same province on the coast of Sweden, and that a bottomry bond, taken up in the same province of the same country as that in which the owners reside, with their consent and at their request, the master being unable or unwilling to advance the required funds, is valid and legal by the laws of Sweden, and is recognized and allowed therein.

The answer on the part of the owners of part of the cargo opposing the bond denied that the bond was valid by the laws of [ \* 301 ] Sweden, at least so far as \* respects the cargo on board the ship at the time when the bond was executed. That it was given in reality to secure a former debt of the owners of the vessel, and that the master, by whom the bond was given, had so admitted. That the whole of the cargo laden on board the vessel at the time the bond was executed, was the property of British subjects, and for these and other reasons could not be enforced by the Court of Admiralty.

A reply was brought in by the bondholder expressly denying that the bond was in reality given to secure a former debt of the owners of the ship, or that the master had ever so admitted. That even if the whole cargo on board the ship was the property of British subjects as stated, that circumstance would not affect its validity, or the power of the Court of Admiralty to enforce the payment thereof.

The case was argued by *Jenner* and *Twiss*, for the bondholder.

*Addams* and *Robinson*, *contra*.

\* JUDGMENT.

DR. LUSHINGTON. It is necessary in this case for me to enter more minutely than usual into the preliminary proceedings which have taken place, because both parties, I think, have unfortunately lost their way, and considerable delay and much unnecessary expense have been incurred in consequence. The suit is brought at the instance of Messrs. Wilson & Co., of Hull, as the legal holders of a bottomry bond on the ship, freight and cargo. The action was entered on the 10th of April, 1849, and on the 25th of April bail was given to the action [ \* 302 ] in the sum of 650*l.* on behalf of Messrs. Wilkinson, \* Whita-

ker & Co., as the owners of part of the cargo, consisting of iron. Now this bail was given not only for this portion of the cargo, but also for the freight due thereon. From this time, namely, the 25th of April, until the first of June, the proceedings went on *in pœnam* against the ship and the remaining portion of the cargo, the third default being granted on the 24th of May. On the 1st of June, Mr. Gosling, on behalf of the bottomry bondholder, brought in his act on petition, and I apprehend the propriety of taking that step depended entirely upon the value of the ship and freight as compared with the amount of the bottomry bond; for if the ship alone was sufficient to answer the bond, there could be no just reason for proceeding against the cargo. I do not mean to say that the cargo should not have been arrested at all, on the contrary, I think that it was quite justifiable, in the first instance, to secure the whole property over which the bond extended. The bondholder, however, having obtained bail for the cargo, and the action against the ship not being defended, the action against the cargo should have been suspended until the ship had been sold, and it had been ascertained whether there was any deficiency or not. This, in my view of it, would have been the proper course for the bondholder to have adopted, unless it had been quite manifest at the time that the whole proceeds of the ship would have been insufficient to pay the bond; and the reason is quite clear, namely, that where a bottomry bond attaches upon a cargo, that cargo cannot be made subject to the payment of the bond until the proceeds of the ship and freight have been exhausted. The ship is the primary fund, the cargo is secondary; if the ship, therefore, be sufficient, proceedings against the cargo are altogether \* useless and [ \* 303 ] unnecessary. The same principle would apply with equal force if the freight was not exhausted, as was decided by Lord Stowell in the case of *The Prince Regent*. In the present case it is true the case became more complicated, in consequence of the bail being given for a part of the freight only; still, however, that circumstance does not affect the principle of the primary application of the proceeds of the ship.

On the 12th of June, Mr. Coote brought in his answer to the act; and I think that had he been aware of the true state of circumstances, he ought not to have done so, but he ought to have prayed the court to stay the proceedings against the cargo until the ship had been sold, and the sufficiency or otherwise of the proceeds had been ascertained. In respect, therefore, to the conduct of the proceedings in this case, I think that, in point of fact, both parties did not see their way clearly; and unfortunately the consequence has been that much time has been lost, much unnecessary expense has



been incurred, the ship itself has been deteriorated, and, in consequence thereof, if the bond should be enforced as against the cargo, such cargo has possibly been rendered unnecessarily answerable. I must now advert to the other proceedings which have taken place in this case, in order, by examining all the facts which have been stated, to ascertain whether the bond be or be not good as against the cargo. The original act on petition states that the ship belonged to Uddevalah in Sweden; that she sailed from Gottenberg for Hull on the 13th of November, laden with iron and deals. That in consequence of disasters at sea she was compelled, in the latter end of November, to take refuge in Romso Bay; that on the 3d of December [ \* 304 ] \* she proceeded to Stromstad, where the cargo was unladen, and great repairs were found to be necessary. The act then goes on to state that the master proceed to the residence of the owners, about sixty miles distant, who told him that they were unable to furnish him with the necessary funds, and that he must borrow the money upon bottomry. Such is the statement in the act, but it turns out in the evidence that the master did not go over to the owners from Stromstad but from Romso Bay, prior to the ship reaching Stromstad. It is then further stated, that upon his arrival at Stromstad, the master applied to Mr. Torren to assist him in effecting the repairs, and to advance the money which might be requisite upon bottomry. That accordingly the sum of 392*l.* 15*s.* 11*d.* was advanced by Mr. Torren on bottomry, and a bond, dated the 26th of March, 1849, was granted for that sum. The bond purports to bind both ship, freight, and cargo, and to bear interest at 15 per cent. The act further alleges that the bond so granted, with the consent of the owners, is valid by the law of Sweden, though such owners resided in the country where the bond was granted.

The answer to this act on petition is extremely brief; it denies that the bond is valid according to the law of Sweden as relates to the cargo, which is the property of British subjects; it also alleges that the bond was given to cover former debts of the owners of the vessel; and it then states that the whole of the cargo belonged to British subjects, and concludes with the averment, that for these and other reasons the bond could not be enforced by this court. Upon these pleadings the case came before me in the first instance; and the evidence [ \* 305 ] on the \* part of Wilkinson & Co., the owners of the cargo, did not support the defence, in support of which affidavits were laid before the court referring to matters which had not been put in issue on the pleadings. One of these affidavits, marked E., made by a person named Joehn Carl Woerns, stated that the ship had never been repaired since she was built; that at the period when the bot-

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The Bonaparte. 3 W. Rob.

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tomry transaction took place she was only twelve months old, that her sails were apparently of the same date, and that her value altogether was not more than 200*l*. There were also other affidavits of Mr. Preston and Mr. Appleby, persons resident at Hull, and conversant with such affairs, very nearly to the same effect. I must here state that in the commencement of the act on petition, it had been represented (as it now appears erroneously) that the vessel was of fifty-two tons only or thereabouts; and this circumstance immediately struck me as not unimportant, inasmuch that, if true, the vessel could have been of very small value indeed, and would naturally lead to a reasonable suspicion that the cargo had been improperly hypothecated. Considering it therefore right that further inquiry should take place, I received the extra articulate affidavits, and directed a survey and appraisement of the vessel to be made. My object was to ascertain whether or not the value of the ship was in reality so exceedingly small, that the taking a bond to bring the ship and cargo to Hull was, in point of fact, going almost to the extent of committing a fraud on the owners of the cargo. Since I made the decree in question, the bondholders have, by the permission of the court, brought in additional evidence, and the vessel has been sold pursuant to the order of the court. The result of this sale has been, that she has fetched a \* sum considerably less than the amount of bottomry bond, [ \* 306 ] and consequently there is a deficiency, for which the freight, which is small, and the cargo, must be liable, provided the bond be valid as against the cargo. Then how does the case stand with respect to the various grounds of opposition which have been raised on behalf of the owners of the cargo; and first, as to the averment, that the bond was given to satisfy antecedent debts owing by the owners of the vessel. With respect to this ground of defence, I have no hesitation in saying that there is no evidence to support the averment, and the objection, therefore, falls to the ground.

With respect to the next objection, that the bond was invalid by the law of Sweden, I do not think it necessary to enter into any discussion upon the question of the Swedish law, because the validity of the bond must be determined upon the general maritime law, and not by the municipal law of the country where it was granted, so far at least as any question arises upon the obligatory effect of the bond on persons not being Swedish subjects. The putting in issue the question of Swedish law, both on the part of the bondholder in his act on petition, and of the owners of the cargo in the reply, was, it is to be observed, altogether unnecessary. It would, I conceive, be most extremely inconvenient in these cases that the court should look to the law of the country where the bond happens accidentally to be

granted to govern its decision in each particular case. It would necessarily lead to this, that in all cases of bottomry I should have to inquire and ascertain what the law of the country was ; whereas the principle upon which the court has always proceeded has been to direct its consideration to the general law maritime, and not [ \* 307 ] \* to the municipal law of any particular country.

With regard to the averments set forth in the affidavits, to which I have heretofore referred, that the ship was a new ship, that no repairs had been done, no new sails furnished ; this charge, it appears to me, is not only unsupported by any direct and positive testimony, but is wholly disproved by the evidence which has been brought forward by bondholder. By that evidence it appears that she is of the burden of 52 Swedish lasts, or about 120 tons ; that prior to the repairs, and after the damage had been sustained, she was valued at Stromstad at 416*l.*, and, after the repairs had been effected, at 666*l.* Now if this vessel was of the value as there stated, or nearly so, at the time the bottomry bond was taken, there is, in my judgment, at once an end of all suspicion that the bond was granted only to make the cargo bear the expenses of the ship ; for the ship alone would have been sufficient, even without freight, to have defrayed the amount of the bond. As this is the real point of the inquiry, I need not examine minutely into the surveys and the appraisements which have been made in this country, for they cannot affect the *bona fides* of the original transaction in Sweden, nor can the amount for which the ship is now sold here produce any such consequence ; for I cannot hold that the amount for which she was sold, after she was detained such a length of time, and thereby deteriorated, would be evidence to disprove the value of the ship when the bottomry bond was taken, and the original valuations were made by competent authority. Upon the facts of the case, then, I am satisfied there is no proof of any fraud having been practised for the purpose of saddling the [ \* 308 ] cargo with the \* expense of the repairs. I am also further of opinion that if the ship had been sold here without incurring any expense, as soon as the proceedings would have allowed, the deficiency in the proceeds, if any, would have been comparatively very small indeed, and the liability of the cargo would have been proportionably diminished. The question, then, comes back to this, namely, whether, in the absence of any proof of fraud, the bond is invalid by the general maritime law as regards the cargo, by reason of such bond having been granted in the country of the owners of the ship, and with their sanction, but without any notice having been given to the owners of the cargo.

Now I am of opinion that the principle, as far as it extends, (for it

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The Bonaparte. 3 W. Rob.

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is not a universal rule,) that a bond shall not be granted in the country where the owner of the ship resides, is a principle which is directed rather to the protection of the owner of the ship than the owner of the cargo, and that this principle must in all cases depend upon the facility or otherwise of communication with the owner of the ship or cargo. Where the owner was resident abroad, the principle clearly would not apply, especially in this case, where the owner of the ship was a consenting party. \* It has been contended, as a further objection in this case, on the part of the owners of the cargo, that the cargo ought to have transshipped, or communication ought to have been made by the master to them before the bond was given. With respect to the first point, I am not aware that there is any general obligation on the master of a vessel which is in need of repairs, to transship the cargo. In the present instance, judging from the papers which have been laid before the court, the question appears to have been considered by the authorities at Stromstad; and I think it right \* to observe, that all the proceedings before [ \* 309 ] them, and I have gone through the whole of them carefully, seem to me to have been conducted with the greatest possible care and attention, and I have no reason to doubt the fairness of all persons concerned therein. With respect to the second point, it appears by the affidavit marked No. 3, that information of the necessities of the vessel was conveyed to the shipper of the cargo, and he refused to advance any money at all. Under this state of circumstances, does the law require that the master, as a matter of necessary obligation upon him, should have made a communication to the owner of the cargo in England, if, indeed, he knew who that owner was. As far as the evidence before me goes, there is nothing, either in the bill of lading or in the other circumstances of the case, which shows that the master knew in whom the property of the cargo was. I know of no authority which renders it imperatively necessary that such a communication should always be made; and I certainly do not perceive that the circumstances of this case particularly required it. So far as the authorities go, in the case of *The Gratitude*<sup>1</sup> Lord Stowell said, and said truly, it was exceedingly desirable that application should be made to the consignee of the cargo, where it is practicable; but in no case whatever, to my knowledge, and none has been cited, has it ever been laid down by this court that there was an absolute necessity of making such communication. It may undoubtedly be expedient to do so for various reasons, amongst others, to take away

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<sup>1</sup> [3 C. Rob. 240.]

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The Lochlibo. 3 W. Rob.

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all suspicion of fraudulent intention on the part of those concerned in the bottomry transaction. It was, in the course of the argument, urged, that if the ship was of the value stated, the money [ \*310 ] might have been \*raised on the ship alone, without hypothecating the cargo. This might certainly have been done, if the party lending the money had been satisfied with the security of the ship alone; but neither in practice nor in law is a person advancing his money on bottomry in any measure bound to restrict his security to the ship, but it is optional to him to require the additional security of the freight and cargo. Looking, then, at all the circumstances of the case, I am bound to pronounce for the validity of the bond. The objections which have been raised upon the facts which have been set up are not proved, and the objection of law is not, in my judgment, maintainable. I must also give the bottomry bondholder his costs, which are due to him as a matter of justice generally, and not the less so in the present instance, because much of the expense which has been incurred in this suit has been occasioned by the suggestion of facts on the part of the persons opposing the bond, which facts have been altogether unsupported by proof.

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THE LOCHLIBO,<sup>1</sup> Boyd.

July 20, 1850.

A vessel with a duly licensed pilot on board condemned in a cause of collision, the fault being equally imputable to the crew on board.<sup>2</sup>

THIS was a cause of damage by collision, promoted against this vessel by the master and the owner of the bark The Aberfoyle.

The proceedings in the cause were by plea and proof; and, on the part of the owners of The Aberfoyle, the libel, consisting of ten articles, in substance pleaded that The Aberfoyle sailed for Calcutta with

a general cargo on the 6th August, 1849, bound to the port [ \*311 ] of London; that she arrived off Beachy Head \*on the 16th December following; and having taken a pilot on board in the vicinity of Folkestone, at 6.30 P. M. of the same day was safely brought to anchor in the Downs, in nine fathoms water, in a clear wide berth, about two miles and a half distant from the land, the wind at the time being south, and with one vessel only anchored

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<sup>1</sup> [S. C. 1 Law & Eq. R. 653.]

<sup>2</sup> [The Christina, 3 W. Rob. 27.]

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(distant about half a mile in shore), on the starboard quarter of the bark, the South Foreland bearing S. W. by S., and the Gull Stream east; that upon being so brought to anchor, all the sails were furled with the exception of the foretopmast stay sail, which was left ready to keep the bark clear of her anchor, if required, during the night; that forty fathoms additional chain were got on deck for emergencies, and at ten o'clock the decks were cleared up and the anchor watch was set, the chief mate and a seaman keeping the same; that the night was hazy, but the lights of the South Foreland (distant about six miles), as also those in the town of Deal and the Gull Stream Light, each distant about three miles, were clearly visible, and vessels passing up channel could be seen at the distance of nearly half a mile; that about 11 P. M. The Lochlibo, which was sailing large and with the tide, and going at the rate of full nine knots an hour, was seen by the watch on deck full a quarter of a mile off, bearing down towards The Aberfoyle, apparently to pass between her and the other vessel, anchored on her starboard quarter, as aforesaid; that the chief mate immediately mounted the starboard forerail, and held up a brilliant globe signal lamp, which was kept lighted for the purpose, and the watch on deck loudly hailed the said bark, but that no attention was paid to such hailing until several minutes afterwards, when the helm of The \* Lochlibo was ported, [ \*312 ] but too late, and The Lochlibo immediately after came into The Aberfoyle, and struck her about the afterpart of the forerigging on the starboard side, carrying away the main and mizen masts, and doing other very considerable damage; and that having done so, The Lochlibo immediately filled and sailed away, without attempting to render any assistance; that the crew and pilot of The Aberfoyle, immediately on the collision occurring, came on deck; and, as the water was rushing into the bark through her starboard side, the pumps were set to work immediately; but in about half an hour afterwards, it being found that unless The Aberfoyle was run ashore she would founder, orders were given to run her ashore, and as much sail as possible being set, she was run ashore abreast of the No. 1 battery, near Deal; that after being lightened and temporarily repaired, she was with great difficulty got into Ramsgate, where her cargo was further discharged and she was further repaired, and from thence was towed to London, where she arrived on the evening of the 24th of said month, and was taken into the West India Dock, both the bark herself and her cargo being almost destroyed, and rendered of little or no value by the collision; that the loss sustained by the owners of the said ship amounted to the sum of 7,000*l.*, and was wholly and entirely occasioned by the mismanagement and default of the persons on board The Lochlibo.



The allegation given in on the part of the owners of The Lochlibo in substance alleged, that The Lochlibo, of the burden of one thousand and six tons, laden with a general cargo, sailed from Quebec, bound to the port of London, on the 14th November last; that she arrived off Dungeness on the 12th December, and at 7, P. M., took on board a duly licensed Cinque Port pilot, and that all hands were at such time on deck to furl the sails of the said ship to lay to for the said pilot, and that they all so remained on deck until after the collision had taken place; that the charge and direction of the ship was entirely given up to the pilot upon his going on board, and she proceeded under his charge in her proper course, with a strong flood and with the wind almost S. S. E. and the sea moderate, and passed the South Foreland light at a distance of about three miles, and about 10, P. M., she passed close by and was hailed from the South Sand light-ship; that the night was at such time very dark and hazy, and dark objects were not easily discernible on the water, though the several lights in the neighborhood, namely, the South Foreland light, the South Sand Head light, the Gull Stream light, North Sand Head light, Ramsgate Tower light, and Deal town lights, were all visible; that a good look-out was throughout kept on board The Lochlibo, two seamen being stationed, one on each bow, on the look-out forward; the chief mate being on the larboard side in the waist of the ship; the second mate on the starboard side; and the master and the pilot on the poop; and about 11 o'clock the boatswain, an experienced seaman, took his station at the heel of the bowsprit, as an additional look-out forward; that at about 11, P. M., the ship was proceeding on a N. N. E. course with two topsails, two top-gallant sails, a foresail and gib set, and going at the rate of about seven knots an hour, to wit, about four knots an hour through the water, and with the flood-tide, which ran about three knots an hour; that the ship was at such time at a distance [ \*314 ] of at least from two miles to two miles and a half from the shore, and was kept in such a course for the express purpose of keeping outside the usual anchoring ground for vessels in the Downs; that at this time one of the look-out men forward reported a vessel right ahead, and such ship, when seen, appeared to be about four ship's length distant, and a very large ship, and high out of the water; that the helm of The Lochlibo was thereupon put hard a-port and answered her helm immediately, and almost directly after the helm had been so put a-port, and The Lochlibo was clear of the vessel so reported, another vessel was discovered by the look-out man forward, apparently at anchor ahead of The Lochlibo, and rather on her starboard bow, and distant about two or three ship's length;

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that the pilot thereupon ordered the helm of The Lochlibo to be put a-starboard and hard a-starboard, and the helm was directly brought over from hard a-port to hard a-starboard, and the vessel answered her starboard helm; but before she could be made to feel the full effect thereof, in consequence of the rapid transition from hard a-port, and the influence of the flood tide, and the wind S. E., she came into collision with the said vessel at anchor, which proved to be the bark Aberfoyle; that immediately on the collision occurring, the pilot ordered the yards of The Lochlibo to be borne all aback to clear the bark, which was done, and so soon as they were clear thereof he ordered the mainyard to be filled, to prevent The Lochlibo from fouling the ship which had been first seen, and The Lochlibo was then run before the wind; that the master of The Lochlibo requested the pilot to bring the ship to anchor, but he refused to do so, inasmuch as he then stated sail could not be taken off her, nor could she, in her \*then situation, be brought up without [ \*315 ] greatly endangering her safety, and the said ship was thereby accordingly prevented rendering or attempting to render any assistance to The Aberfoyle; that The Aberfoyle, at the time of the collision, was at anchor at least two miles from the shore, in nine fathoms water, the Gull Stream light bearing from her N. E., distance from three to three miles and a quarter; the South Sand light bearing from her S. and by W. one mile and a quarter W., distant about four miles; the South Foreland bearing from her about two miles and a quarter; that the spot where The Aberfoyle was so at anchor, and where her anchor was afterwards pulled up, was far without the regular anchoring ground, and was in the direct way of vessels passing through the Downs by the Gull Stream; that although at anchor, she had not any light exhibited, nor was any light visible from her until the very minute of the collision, at which time a light was shown by some person on board the said bark; that no hailing from her was heard on board The Lochlibo; that the night prior to and at the time of the collision was dark and hazy, and the bark was heavily laden and very deep in the water, and was not discernible from on board The Lochlibo, notwithstanding a good and efficient look-out was kept on board; that the pilot in charge of The Lochlibo was a duly licensed Cinque Port pilot, and he alone gave all orders and directions for the navigation of the ship, and such his orders and directions were exactly and implicitly obeyed, and no person whatever in any manner interfered or attempted to interfere in the navigation of the ship, saving in obedience to the orders of the said pilot; that by reason of the premises the collision was caused either by the neglect \* of those on board [ \*316 ]

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The Aberfoyle, in anchoring at the place as pleaded, and in not exhibiting a light in due time, or keeping a sufficient look-out, or hailing in due time, or that the said collision happened from or by reason of some neglect, default, incompetency, or incapacity of the pilot so taken on board.

The case was argued before Trinity Masters, by

*Addams* and *Twiss* for the owners of The Aberfoyle.

*Harding* and *Bayford* contra.

PER CURIAM

DR. LUSHINGTON. Gentlemen, the court is much indebted to you for the long and patient attention which you have bestowed in the discussion of this case; a case which involves in itself a very considerable amount of property, and entails upon our consideration some questions of fact of no small difficulty. With regard to any questions of law, there are none (it appears to me) which give rise to any difficulty on the present occasion, and in bringing under your notice the facts of the case, it must be my endeavor to point out to you as clearly as I can, the precise questions upon which it will be necessary for me to request your opinion, and as far as it may be in my power to simplify the evidence, without attempting to enter into very minute details upon that which has already been so thoroughly sifted. It appears, gentlemen, that The Lochlibo, the vessel proceeded against, of 1,006 tons, was proceeding with a cargo of timber, bound to the port of London, and The Aberfoyle, of the burden of 460 tons only, was on the prosecution of a voyage from Calcutta to [ \*317 ] London with a cargo of sugar. It is also stated that \* both ships were in charge of regularly licensed pilots; that The Aberfoyle was at anchor at the time of the collision, and the collision took place at eleven o'clock on the night of the 14th December last. With respect to the precise place in which The Aberfoyle was so anchored at the period of the collision, that will probably be a matter for consideration presently. With regard to the weather, it is to be collected from the representation of the witnesses, that originally the night had not been very dark nor hazy, but that as it advanced it became dark, and the weather, to a certain extent, more hazy. Such is, I think, the fair result of the whole of the evidence upon this part of the case, without troubling you by going into it minutely. The wind, it is to be observed, is variously described by the witnesses on the one side and the other. By the master and pilot of The Lochlibo it is represented as blowing from the S. S. E., by other of the

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witnesses as blowing from the N. W. Under this discrepancy in the respective statements, we must, I apprehend, take it as somewhere between the two points. It appears that the tide was running in favor of The Lochlibo, and that she was proceeding, it is variously stated by the witnesses, from seven to eight and a half knots an hour.

Now, gentlemen, the first question which arises is one which, I think, we shall have no difficulty in disposing of in a very short space of time. It is this, namely, whether the collision in question was occasioned by inevitable accident or not; in other words, whether it is a case in which neither party is to blame. If either of the two vessels was to blame in any particular, whether from the default of the crew or of the pilot, or from the joint misconduct of both, then, of course, the collision could not be the result of inevitable [\* 318] accident. Now taking into consideration the state of the wind, the tide, the weather, and all the other facts and circumstances of the case, I am bound to tell you that in my judgment this collision could not have arisen from what we call inevitable accident. This is my judgment upon this part of the case, and of course I shall be prepared to reconsider that opinion, if you, gentlemen, should be induced to come to a different conclusion. By inevitable accident, I must be understood as meaning a collision which occurs when both parties have endeavored by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. In this acceptation of the term it does not, I repeat, appear to me possible to say that a collision, which took place in the manner and under the circumstances which this did, can be said to come under that definition. Assuming that you shall coincide with me in this opinion, our next inquiry must be from whose fault did the collision arise; whether from the fault of either of the pilots alone, or from the fault of the pilot and crew of The Lochlibo, or of those on board The Aberfoyle. Before entering into the investigation of these particulars, I think it expedient here to point out to you what I apprehend to be the principle of law, as applying to certain facts which are admitted in this case; I allude to the facts, that The Aberfoyle was at anchor, and that The Lochlibo was under sail at the time when this collision took place. Under this state of circumstances, gentlemen, it is, I conceive, perfectly clear that *prima facie* the principle of law would be, that the *onus probandi* lies with the owners of The Lochlibo in the present instance. This [\* 319] was wisely and properly admitted by the learned counsel for The Lochlibo in the course of their argument. The owners of The Lochlibo, therefore, are bound to establish by credible evidence that

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she was not to blame at all, or that the blame of the collision solely rested with the pilot who was on board, in which case the owners would be clearly exonerated from all responsibility. Now, in considering this point in the case, I will begin in order of time with the case which is set up by the owners of The Aberfoyle, the parties proceeding in the cause, in their action on petition. It has been contended that The Lochlibo, having proceeded on her voyage after the pilot had been taken on board, the master of that vessel was responsible for the collision in question, for not taking in sail, and thereby diminishing the speed of his vessel; or in not having brought up, as it has been urged he ought to have done under the circumstances of the case. In support of these two positions, the case of The Girolimo<sup>1</sup> was cited; and I will now, gentlemen, shortly state to you what that case was, and how far I do not altogether accede to the propositions of law as laid down by the learned counsel under the authority of that case. In that case The Girolimo, the vessel proceeded against, was proceeding down the river Thames, when a fog came on, and the vessel still continuing her course, she ran into another vessel in the neighborhood of Woolwich. In the course of the argument in the case, a great deal of discussion was entered into with respect to a point which does not embrace our present consideration, namely, whether the Pilot Act did or did not apply to the owners of foreign vessels. In delivering his judgment in that case, Sir J. Nicholl [\* 320] observed to the following effect: "Did this accident arise (he says) from the neglect, default, incompetency, or incapacity of the pilot, or was the master *in pari delicto*? It occurred from the vessel going on in the fog, not from any act of bad steerage, want of knowledge of shoals, or any incapacity as pilot, but from proceeding at all. It seems to be nearly admitted, that if the vessel had set off in this fog, blame would have been imputable to the master; if so, was he not blamable in going on in the fog? Had he not a right to resume his authority? Did he not owe it to his owners, and to other persons whose property might be damaged by a collision, to insist upon bringing the vessel up? If he was in as much haste to get out of port as the pilot was to finish his job, were they not *in pari delicto*? Was not the master bound, in duty at least, to remonstrate with the pilot, and to represent the danger of proceeding? Yet he says in his affidavit that he did not in the least interfere. In this respect the case is, as far as I am aware, new; and one of too much difficulty to arrive at any hasty decision upon, unless

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<sup>1</sup> [The Girolamo, 3 Hagg. Ad. R. 169.]

there be no other points upon which the case may be disposed of." In point of fact, therefore, the case of *The Girolimo* is no authority whatever upon the point in question. From the observations of the learned judge who decided that case, it is probable the leaning and bearing of Sir John Nicholl's mind was, that the master would be responsible for not having interfered under the circumstances. The case, however, of *The Girolimo* was not decided upon these grounds, nor can it be considered as a case in point in the present instance. Gentlemen, such being my view of the case in question, I am now bound to tell you, that whatever might be the decision in the case \*referred to, looking to the circumstances of the [ \* 321 ] present case, I am of opinion, that where a pilot is taken on board at Dungeness, for the purpose of navigating a vessel to Gravesend or Margate, or wherever it may be within his pilot ground, all the responsibility attaches on the pilot; and it is no part of the duty of the master to interfere or determine whether the vessel ought to be brought up at the South Fore land, or in the Downs, or in Margate Roads; and I cannot consider in this case that the master was to blame even if you should be of opinion that the vessel proceeded against ought to have been brought up as suggested. It appears to me that it would be a most dangerous doctrine to hold forth, considering the duties imposed upon pilots, and the experience and local knowledge they are supposed to possess, if I were to sanction the interference of the master in any way in the performance of those duties which the pilot must be considered more peculiarly competent to discharge, and of which the master, in the majority of cases, must be a very inferior judge. I do not of course in these observations intend to go the extraordinary length of saying that under no possible state of circumstances is the master justified in interfering with the pilot. If the latter was utterly incompetent to the proper discharge of his duties, it would clearly be incumbent upon the master to interfere for the protection of the lives and of the property on board his vessel. Such, however, would be a case of extreme necessity. Looking more immediately to the circumstances of the present case, I am clearly of opinion that it was entirely within the province of the pilot to determine whether the vessel should proceed or not, and that the master is in no wise culpable in not \*having interposed or [ \* 322 ] interfered in the matter in question. Having thus adverted to one of the main grounds for blame imputed to the master of *The Lochlibo* by the owners of *The Aberfoyle*, I now approach the facts relating to the collision itself. In so doing, I must briefly refer to the evidence which has been already so much travelled over, and I will first direct your attention to the statement of the pilot on board *The*



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Lochlibo. After having stated in his deposition on the fourth Article, that on boarding The Lochlibo he had two lights placed, one on each spritsail yard arm, and that he continued them there until the ship arrived off the South Foreland, when they were taken in, and two men were stationed on the look-out, one at each bow, he further deposes to this effect, "that the captain suggested the boatswain as an additional look-out at the bowsprit end, and, as the boatswain states, between the knightheads and the bowsprit, the chief mate being stationed on the port waist." Gentlemen, it does not appear to me necessary to call into question whether the boatswain was specially appointed by the master or the pilot to take up the look-out; he did take up the look-out, and apparently sees better than any one else, because he sees the vessel, The Aberfoyle, at an earlier period than the rest of the crew who were on deck. After stating, upon this subsequent article, that he passed by close to the South Sandhead light ship, with a view to avoid ships that might be within anchorage ground, he comes to the period of time immediately preceding the collision, he says, "I saw a light on our port beam, which I supposed to be, and afterwards found out was, the light from a ship [ \* 323 ] \* named The Camden, from Quebec, which was at anchor about half a mile off us, and two miles from the shore. I pointed her out to the captain, and at the same time remarked upon the hazy state of the weather, stating, that as we were then situated, there would be more risk in anchoring, or attempting to anchor, than in proceeding through to Margate Roads." Here then is a conversation relating to The Camden, antecedent to the discovery of other ships. He then goes on to state in these words, "I had just said this, when the look-out forward, but whether it was the boatswain or not I do not exactly know, though I think it was, reported a vessel right ahead," — gentlemen, I submit to you that this vessel could not have been The Camden, respecting which the conversation had taken place between the pilot and the master, because that vessel bore a light, and was on the port beam of The Lochlibo; — "immediately upon which I ordered the helm hard a-port, the sails having been some time before so trimmed as to admit of the helm being put hard a-port without neutralizing their effect. I did not see the vessel so reported at all before the collision in question; but after the collision I saw a very large light ship to the N. N. E. of me, standing at least from twelve to fifteen feet out of the water, which I think it very probable was the vessel so reported." According to this statement, it appears that there were two vessels in the neighborhood of The Aberfoyle at the time of the collision; and when I look to the statement of Sackett, the pilot on board The Aberfoyle, his statement satisfies

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me that this evidence is so far correct. He says, The Aberfoyle was then in as good a birth as any vessel in the Downs, and I have known the Downs about forty years. There were two barks \* at anchor near her in a fair berth for her, one on her star- [ \* 324 ] board bow, I should say about two cables' length, or a short quarter of a mile off her, but both were inside her. The description thus given by Sackett of two barks in the neighborhood of The Aberfoyle, appears to me precisely to correspond and tally with the evidence of the plaintiff of having seen The Camden and a bark, the name of which is unknown. Now, when the bark was reported by the man on the look-out, the pilot of The Lochlibo does this:— He says, as soon as he heard the vessel reported, he ordered the helm to be put hard a-port. The helm had not been put hard a-port three minutes, before the look-out forward reported a vessel on the starboard bow, and immediately added, "hard astarboard the helm, or you'll be over him, and I instantly ordered the helm hard astarboard." Gentlemen, the master corroborates the statement that it was on the starboard bow, but the boatswain declares positively it was right ahead, and repeats it on interrogatory. Now the question here arises, whether this measure for starboarding the helm was a right or a wrong measure, and if it was a wrong measure, who was to blame for it. The determination of this question, gentlemen, must rest with yourselves; and it will be for you to say whether, considering the state of the wind and tide, and also that The Lochlibo had answered her port helm three or four points, and was swinging with the tide, as described by the boatswain, it was consistent with good seamanship to order the helm to be put astarboard, a measure which it appears to me must have taken some little time before it could produce any effect, and the whole result of which, according \* to the [ \* 325 ] witness, was to neutralize the sails. Gentlemen, I confess that in my opinion it does appear to me that the measure was totally wrong, and that in all probability the collision would not have taken place if such a measure had not been pursued. If I am correct in this opinion, we shall presently have to consider, with some minuteness, whether or not the starboarding the helm of The Lochlibo as stated was or was not exclusively the act of the pilot. *Primâ facie*, undoubtedly it would be presumed that the pilot gives all directions for the altering the helm, and if erroneous, he alone is responsible.

But before we proceed to consider more minutely this question, let us for a moment take that which is necessarily a preliminary inquiry, namely, whether there was a good look-out kept on board The Lochlibo. It is sworn in the evidence of some of the witnesses, that the whole crew were on deck, and that two persons were placed,

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one on each bow, and the boatswain was between the knightheads and the bowsprit. It is certainly very much to be regretted, in the present instance, that the case is deprived of the evidence of either of the two persons who alone are admitted to have been appointed to the look-out. It is, I must say, a great misfortune that such an omission should have occurred, as it places the court, and you also, gentlemen, in a state of no small difficulty. The account which has been given of the absence of these two individuals is, I must confess, very unsatisfactory; because it is quite evident that after this collision had taken place, the owners of The Lochlibo must have anticipated that some proceedings would be taken against her, and the owners must have known that, in such a case, the look-out would

necessarily have been one of the most material features in [ \* 326 ] the case, and the two witnesses in question would be witnesses of great importance. If it had been averred that these persons had suddenly gone away and could not be discovered, the case would stand differently; but I do think, in the absence of any such explanation, that their non-production is a neglect of which the court has reason to complain. Gentlemen, I now return to the circumstance of starboarding the helm. I have already brought under your notice the pilot's statement with respect to the measure itself. With regard to this he says, "the look-out forward, but which of them I do not know, reported a vessel on the starboard bow, and immediately added, 'hard a-starboard the helm, or you'll be over him,' upon which the pilot," says he, "instantly ordered the helm hard a-starboard." Now, gentlemen, if the boatswain erroneously imagined that this was the proper measure to be adopted, and hailed the pilot to adopt it accordingly, and the pilot unthinkingly followed the advice, I must say that in judgment the boatswain would not be altogether exonerated from the consequences of such advice because he was on the look-out. If, on the other hand, it was the pilot's own opinion that the measure was a proper measure to be pursued, however erroneous that opinion might be, the whole blame would fall upon the pilot. The solution of this question I feel is a matter of no small difficulty on the present occasion. The witness Cole, who I admit is competent to give evidence of what he did, has sworn distinctly that no order was given, but an order to starboard the helm, and that such order was immediately obeyed. In this statement he is directly

at variance with one of the other witnesses, I mean the witness [ \* 327 ] Wilson. As the whole gist of this part of the case is, whether there was any vacillation, and that vacillation prevented a decisive course being taken, and consequently brought about the damage that occurred, we must examine with some nicety how

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the evidence lies on this point, and whether Wilson, who has given a different testimony to the witness Cole, is a credible witness on the whole. He says, "shortly before the collision, some one forward, I think the boatswain, but I cannot be certain that it was his voice, reported a ship right ahead; but I did not see her then, nor until after the collision in question, when she appeared to me to be a bark in ballast, standing high out of the water, and painted yellow, and probably of about 500 tons burden." Immediately she was reported, the pilot ordered the helm hard a-port, and I saw the men at once heaving the port helm, and I could see by her head that our ship answered her port helm, but not a great deal; she answered her port helm as quickly as a large ship generally does. Word then came forward that there was another vessel right ahead. The report was, a vessel right ahead, and we will be right into her. I cannot say who made that report, but it was one of the people forward upon the look-out. The pilot upon that said to the man at the wheel, port; that would be to keep the helm to port, as it was; meaning, as I understood him, that they should still, notwithstanding, keep the helm a-port; but the master sung out starboard. I do not know which order was obeyed; but I do not think either of them was, for I looked into the cockpit and saw the men heaving first one way and then the other."

Gentlemen, I will here refer you to the evidence of another witness, the witness Anderson, as to this part of the case. He says to this effect,—"I heard from the forechains, where I was [ \* 328 ] then standing, the skipper say to the pilot, just after we struck The Aberfoyle, and before we got clear of her, I know you did wrong." That is to say, if the expression has any meaning at all, he did wrong in starboarding his helm. You will perceive, gentlemen, that in this statement the testimony of this witness does not support the evidence of Wilson, at the same time it is not unimportant, for this reason, namely, that, according to the evidence of Anderson, the master finds fault with the helm being starboarded. According to the evidence of Wilson, the master himself directs it to be put a starboard. Inconsistent as it undoubtedly seems to be, that the master should thus have given the order to starboard the helm, and after the collision had taken place should have found fault with the pilot for allowing that order to have been carried into effect, it is, in my view of it, exceeding strong evidence that there was a discussion as to which way the helm should be put, and there was something of a conflict between the pilot and the master upon the subject. Gentlemen, I am the more satisfied of this when I look to the evidence of the second mate, Fraser. He says, "the orders were given by the master during the time interrogate, except that he ordered the helm a-starboard after The

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Aberfoyle had been reported, and the pilot had given the same order to the man at the helm. I cannot be sure about it, but I think it was after the pilot had ordered the helm a-starboard, that the master also gave the order." Of course, if that be so, no blame could attach to the master for merely repeating the pilot's order; it would be his duty so to do. The witness, Fraser, then concludes with his averment; at the same time something was said to the effect, that if the [ \* 329 ] \* helm was kept one way or another The Lochlibo would pass clear of the other vessel. If the statement of this witness is true, it is quite manifest that the master, upon the occasion to which he deposes, was complaining of the shifting of the helm first one way, then another, and was declaring his judgment that if it had been kept from the beginning in one position, there would have been a probability of avoiding the collision. So far as it goes, therefore, the statement of this witness does to a certain extent support the testimony of Wilson. Gentlemen, it will be unnecessary for me, after the long discussion which has taken place on the present occasion, to trouble you by going through the evidence of all the other witnesses. This evidence has been most fully commented upon and brought to your notice in the course of the argument. The questions, therefore, which I shall have to ask of you are these: 1st. Whether you are of opinion that a proper look-out was kept on board The Lochlibo? 2dly. Whether the starboarding the helm was a right or a wrong measure? 3dly. Who was to blame for the adoption of that measure? That is the most essential consideration for both parties. If the starboarding the helm was a wrong measure, it will be for you to consider whether you can suppose that a pilot, of the experience which Thornton appears to have had, would, under the circumstances, have directed the helm to be starboarded, unless something peculiar had occurred to induce him to adopt that measure. Gentlemen, before I conclude, I would say a word or two upon the subject of interference. I should never go the length of saying that the mere suggesting to the pilot on the part of the master to take in this sail, or otherwise, to keep [ \* 330 ] as near the South Sand light, \* and *vice versâ*, or to bring the ship up, was interfering, in the legal acceptation of the term, with the duties of the pilot; illegal interference is of a different description. If, for example, in this case the boatswain had called out to the men below to starboard the helm, or if the master called out to port the helm, it would be interference; but it would not be interference to consult the pilot, or to suggest to him that the measures pursued were not proper, or that other measures would in all probability be attended with greater success. Gentlemen, I have, I believe, thus stated all that relates to The Lochlibo.

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With regard to the Aberfoyle, you will have to consider whether the place where she was anchored was or was not a proper anchorage ground. You will also have to consider whether she was bound to keep a light constantly hoisted, and if so, whether in point of fact she did not exhibit that light. According to the evidence of two persons on board The Aberfoyle, they state that it was done, and in due time. It has been commented upon in the argument that the statement made to the owners of The Aberfoyle, as to the locality where the collision occurred, must necessarily be considered as an attempt to impose a false statement on the court. If it be so, it has most signally failed in producing any effect, because I never attempt to define the precise spot where a vessel is at anchor; and I certainly have not done so in the present instance in the observations which I have thought it my duty to address to you. If you shall be of opinion that this circumstance at all affects the merits of the case, I shall be glad to have the benefit of your judgment upon it. Looking to the nature of the case, we cannot do better than retire and consider what conclusion we shall arrive \*at. On their return to [ \* 331 ] the court the learned judge delivered the final decree in these words: The gentlemen of the Trinity House, by whom I am advised, are of opinion that this collision was not the result of inevitable accident. 2dly. That it was wrong, on such a night as this is described to have been, to go through the Downs with such sail as The Lochlibo carried, but the blame of so doing rests upon the pilot exclusively. 3dly. That sufficient evidence has been produced that such a look-out was kept on board The Lochlibo as the state of the weather required. 4thly. That the starboarding the helm just after the helm had been put a-port, and the ship was under the influence of the port helm, was an erroneous measure. 5thly. That the pilot was not exclusively to blame for so starboarding the helm, but there was undue interference with him on the part of the master and crew of The Lochlibo." With respect to The Aberfoyle, the Trinity Masters are of opinion that she was anchored in a proper situation; that she was not bound, being so anchored, to have kept a light fixed; that she exhibited a light as soon as The Lochlibo was seen, and that no blame whatever attaches to her. I must, therefore, pronounce for the damage sued for, and with costs.





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15. The Trinity Masters being of opinion that both vessels were in fault, the court decreed the damage to be equally divided between them. . . . . *Ib.*
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7. An agent at Lloyd's is not entitled to sue as a salvor for the mere hiring and engaging of men to assist a vessel in distress. Claim of alleged salvor dismissed, with costs. *The Lively*, . . . 64
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